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ABSTRACT

This report employs three analytical perspectives (ideological, implementational, and comparative institutional) in order to examine Federal anti-discrimination law enforcement in the New York City school system since the late 1960s. Part I of the study defines the fundamental American egalitarian ideology and its equality of opportunity and equality of results strands. The ambiguity in egalitarian policy standards, as formulated by the courts and by the Congress in Title VI and the Emergency School Aid Act, is discussed. Part II compares the "Big City Review" in New York City with insights gained from similar reviews of faculty hiring and assignment and student service issues, undertaken in Chicago, Los Angeles, and Philadelphia. In Part III, data obtained in the study, as well as results of a survey conducted by the authors, are reviewed from the three analytical perspectives mentioned above. It is concluded, among other findings, that in New York City public schools for the time period examined, (1) commitments to anti-discrimination standards led to positive changes in teacher assignment and student tracking practices, and that (2) the entire process of civil rights enforcement was influenced by political factors at both national and local levels. (A list of persons interviewed and the survey questionnaire are appended.) (GC)

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EQUALITY AND EDUCATION:
FEDERAL CIVIL RIGHTS ENFORCEMENT IN THE NEW YORK CITY SCHOOL SYSTEM

By

Michael A. Rebell

and

Arthur R. Block

February, 1983

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THE NEW YORK CITY SCHOOL SYSTEM

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Michael A. Rebell
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CHAPTER ONE:

INTRODUCTION: A CASE STUDY THROUGH THREE LENSES

In 1974, the Office for Civil Rights of the federal Department of Health, Education and Welfare announced that it would initiate a massive new approach to civil rights enforcement in large urban school systems. The prototype for this ambitious project already was under way in New York City, where a special team of investigators was accumulating hoards of diverse data and devising sophisticated computer processing techniques for probing compliance patterns. Within a short time, this "New York Review" was to become "the largest civil rights investigation of a public education institution ever undertaken."[1]

The legal authorization for the reviews was contained in Title VI of the 1964 Civil Rights Act. In seemingly simple language, Title VI prohibits discrimination on the basis of race, color or national origin in any program or activity receiving federal financial assistance. At the time this law was passed, Congress' focus was on the elimination of the de jure dual school systems in the South that had been declared unconstitutional ten years earlier by the Supreme Court in Brown v. Board of Education.[2] Defining "discrimination" in this context was a relatively straightforward task. By 1972, however, after the most blatant violations of Brown's mandate had been eliminated and the civil rights focus moved on to more subtle discrimination problems in both the South and the North, the identification of "discrimination" became more difficult. Neither the language of Title VI nor its legislative history provided clear standards for this new phase of civil rights enforcement.

In this unsettled legal field, the Office for Civil Rights (OCR), based its "Big City Reviews" (as the multicity investigation came to be called) on a set of controversial premises. The idea of a massive, comprehensive investigation of an entire school system made sense only if one assumed that discriminatory practices were deeply imbedded in the system's normal operating procedures. The designers of this model believed that statistical disparities would emerge from the investigations that would establish an irrefutable pattern of discrimination against minority students, much like the sudden appearance of a recognizable figure in a "connect the dots" puzzle.

Specifically, the New York Review was designed to consider issues such as unequal allocations of resources to predominantly minority schools; racial segregation in pupil assignments to classrooms and "ability" tracks; disproportionate suspensions of minority students; and denial of requisite bilingual curricular and counseling services to Hispanic and other language minority children. In response to complaints filed with OCR by local civil rights organizations, the Review was expanded in 1976 to include sensitive employment issues, such as teacher hiring practices, and racial imbalance in faculty assignments.[3]

By the time the Ford Administration left office in January 1977, the New York Review had produced two detailed "letters of findings" cataloguing nearly two dozen charges of unlawful discrimination. These letters were received angrily by high-level school and teachers' union officials and with cautious optimism by local minority group advocates.

Under the Carter Administration, OCR jettisoned much of massive investigative model approach, but accepted the validity of most of the major allegations set forth in the New York City letters. It pressed ahead with remedial negotiations. Ultimately, these efforts resulted in two "voluntary" agreements, one on the employment issues and another on the student services items.[4] Attempts to implement the agreements thereafter ignited intense political controversy, a re-negotiation of one of the Agreements under the Reagan administration in 1982, and extensive litigation, some of which continues up to the time of this writing, nearly a decade after the Review was first initiated.

The novelty, scope and impact of the New York City Review would be reason enough to undertake a detailed case study of these events. But the Big City Reviews, and especially the New York prototype, are more than merely an interesting chapter in the history of civil rights enforcement -- they also open a window onto the dynamic interaction of ideology, implementation processes, institutional capabilities, politics and law which constitute the entire civil rights enforcement process. From an historical perspective, moreover, the Reviews span a decade of transition from the civil rights offensives of the late 1960's to the retrenchments and diminished expectations of the early 1980's.

Given this potentially rich source of issues and insights, a major challenge for us as researchers and analysts was to develop a methodology suitable for documenting and productively exploring these complex trends. Unlike judicial activism, the subject of our previous study,[5] there was no consistent core of issues and arguments around which to build a single framework for a theoretically based empirical investigation. Our solution to this problem -- inspired by Graham Allison's study of the "Cuban Missile Crisis"[6] and Paul Peterson's approach to policy making in the Chicago school district[7] -- was to analyze the case study data through three complementary analytical perspectives:[8] ideology; implementation; and institutional comparison. By itself, each perspective "is only a snapshot of a multidimensional event," but by combining the three, "one achieves a more [comprehensive and more] exact interpretation."[9]

A. The Ideological Perspective

"Ideology" in popular usage is a vague term, often having connotations of fanaticism or narrow self-interest. But in its classical sense, "Ideology is the conversion of ideas into social levers."[10] Or, more precisely, a political ideology can be defined as:

> "...a system of political, economic and social values and ideas from which objectives are derived. These objectives form the nucleus of a political program."[11]

America has developed such a fundamental ideology[12] on equality issues. This egalitarian ideology reflects a distinctly American world view emerging from the nation's Lockean liberal heritage, its unique historical situation as a pioneering "new world" culture, as well as from its agonizing experiences of slavery and racial confrontation. Thus, egalitarianism in America has roots that are distinctly different from the Marxist and other socialist influences which shaped egalitarian perspectives in the old world European cultures.

America's fundamental egalitarian ideology can best be described in terms of two distinct but complementary ideological "strands":[13] "equality of opportunity" and "equality of result". The "equality of opportunity" perspective emphasizes the right of each individual to pursue his or her goals, and holds that any discriminatory obstacles that impede an individual's path should be eliminated. The "equality of result" perspective shares this basic commitment to individual pursuit, but is more ready to see pervasive discriminatory obstacles in political and social structures;[14] building on the American tradition of pragmatism, the result perspective emphasizes the need for efficacious methods that will ensure prompt removal of discriminatory barriers. Advocates of opportunity, by way of constrast, see in this approach a danger of overemphasis on compliance mandates and numerical quotas which undermine basic individual initiatives and opportunities.

Because adherents of equality of opportunity often agree that affirmative measures should be taken to eliminate discriminatory impediments, and advocates of equality of result retain a commitment to individualism and competition (after discriminatory barriers are thoroughly eliminated) the differences between the two perspectives really represent differing positions on a continuum of the over-all fundamental American egalitarian ideology, rather than distinct, contradictory positions.* At the same time, however, these differences should not be minimized. The tension between the "opportunity" and "result" strands of egalitarian thought is the explosive factor behind controversial civil rights issues like busing, preferential admissions to college and graduate schools, and affirmative action in hiring.

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*For this reason, "equality of result," as defined here, should not be confused with "equality of condition," an egalitarian perspective, which

The Senators and Congressmen who enacted Title VI of the 1964 Civil Rights Act briefly considered, but failed to resolve, these ideological conflicts. The legislative history indicates that the legislators deliberately avoided defining "discrimination" and left the fundamental conflict between notions of equality of opportunity and equality of result to be resolved by the courts or during the administrative implementation process.[15]

The assumptions behind the Big Cities Review's massive investigatory model largely reflected an equality of result perspective. This set the stage for conflict with the New York City Board of Education, whose orientation was

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builds on Marxist notions of distributing wealth "from each according to his ability, to each according to his needs," and which is foreign to America's egalitarian traditions. Confusion arises in this area because some writers overlook the significance of the unique pragmatic, but yet individualistic, "results" oriented approach of American civil rights advocates, and unnecessarily equate the terms "equality of result" and "equality of condition." See, e.g., W. Ryan, Equality 29 (1981) toward classical notions of equality of opportunity. Viewed in ideological terms, then, the case study of the New York Review is a story of how issue was joined between organizations reflecting these divergent perspectives and of the way in which ideological compromise was achieved. As such, the study has important implications for the broad range of "opportunity/result" controversies which are at the "cutting edge" of contemporary civil rights controversies.

B. The Implementation Perspective

The increased social reform activism of the federal government in the 1960's and 1970's was paralleled by a new approach to the study of public policy by social scientists. A body of literature known as implementation analysis emerged from the more traditional fields of public administration and policy analysis.

"Impact studies" were the forerunners to implementation analysis. These investigations sought to determine whether there had been effective compliance with particular laws or policy directives. Typical subjects were problems of compliance with major Supreme Court decisions such as the ban on school prayers[16] and the extent of improvement in student performance in programs funded under Title I of the Education and Secondary Education Act of 1965.[17]

Many of these studies found that compliance with major court rulings and statutes was incomplete, and that expensive social programs were not delivering the anticipated results. These specific findings, together with a growing popular perception that many of the ambitious social programs of the "Great Society Era" had not succeeded, led to heightened awareness among social scientists of the distinction between the formulation of a policy and its actual achievement. By the mid-1970's, this gap -- aptly termed the "missing link"[18] -- had become the focus of a number of scholarly undertakings which came to be known as implementation analysis.

Many of the implementation case studies, particularly the earlier ones, "were factually dense accounts, usually lacking explicit theory or conceptual frameworks."[19] In reaction, some scholars began to formulate comprehensive theories, drawing upon a wide variety of social science disciplines,[20] often complete with complex schemes of variables.[21] These theoretical schemes in turn have drawn criticism by other scholars who note that the "fragmentary and disjunctive nature of the real world...[make] a general theory of the implementation process...unattainable and, indeed, unrealistic."[22] These critics believe that policy making shall be viewed as an organic and evolutionary process.[23]

The implementation literature provides an important new analytical approach. Its basic methodology, though still in a formative stage, serves to free one from the assumption that an adequately funded government program will fully achieve its stated goals, and it forces one to be sensitive to particular factors -- conceptual, organizational, political, environmental, legal, -- that can impede implementation. Implementation analysis also complements the ideological perspective. There is a tendency in analyzing events from an ideological perspective to assume that they can fully be explained by the purposeful actions of unitary actors who are pursuing clearly articulated goals.[24] The implementation perspective, however, emphasizes the "non-rational" factors such as organizational routines and bureaucratic politics, that will inevitably deflect, modify or defeat even well-conceived plans and objectives.[25]

Applying this perspective to the New York Review, we determined that the organic, evolutionary process at work here could best be described in terms of three major variables that have been previously identified in the implementation literature. First, is "goal ambiguity," a variable that was more pervasive in this situation than it was in most other implementation studies.[26] This dominance stemmed from Congress' failure to define the operative standard --discrimination -- that was the raison d'etre of the statute.

The second major variable is "organizational process," encompassing both the normal routines of the federal and local bureaucracies, and the additional problems raised by the innovative data collection and systems management techniques created for the Big City Reviews.[27] The third major variable is "politics" -- national politics (like President Nixon's "Southern Strategy); local politics (such as historical battles among the Board of Education, the Board of Examiners, the teachers union and minority group advocates on teacher hiring and licensing issues) and everyday bureaucratic personality clashes and turf battles.[28]

In short, analyzing the events of the New York Review in terms of these three major variables will both provide important insights on implementation problems, and place our conclusions in a conceptual framework that will facilitate comparisons with existing or future implementation analyses.

C. Comparative Institutional Perspective

The starting point for any consideration of comparative institutional roles within the American system of government is, of course, the traditional model of separation of powers. This model posits a tri-partite division of governmental functions among the legislative, executive and judicial branches. The legislature, as the people's direct representative body, is generally seen in normative democratic theory as the forum for making basic value choices and policy decisions. The executive's role is primarily to "execute the laws" which incorporate these legislative policy decisions. The role of the judiciary, the least political branch, is to apply the legislative policy formulations and intent (and the Constitution) to particular cases and controversies.[29]

Increasingly, it has been recognized that contemporary exercises of governmental authority do not neatly fit into these categories. This is particularly true in the case of administrative agencies. The era of modern administrative agencies began less than 100 years ago, with Congress' creation of the Interstate Commerce Commission in 1887. Since then, agencies have proliferated in number, variety and function, with a corresponding growth in the conceptual problems of reconciling their actual activities with democratic theory.[30] In fact, "...the development of the administrative agency in response to modern legislative and administrative need has placed severe strain on the separation of powers principle in its pristine form."[31] The actions of administrative agencies, in wielding enormous powers without being accountable to the electorate, raise "legitimacy" issues which are so serious that they have been said to constitute a continuing unresolved "crisis" for the functioning of American Government.[32]

Much of this "legitimacy" problem stems, of course, from Congress' tendency to delegate substantial policymaking authority to administrative agencies without clear standards as to how such delegation should be exercised.[33] Because Congress lacks both the time and the expertise to decide the plethora of policy choices involved in the complex social and economic regulatory process that seems inherent to modern government, substantial delegation of authority to administrative agencies is probably unavoidable. This does not mean, however, that all issues are equally suitable for delegation, from a legal, practical or political point of view, or that improvements can not be made in agency accountability and capability to exercise such functions.[34]

Congress' failure to define "discrimination" in Title VI is a prime instance of such a delegation of fundamental policy-making responsibility. It, therefore, provides an opportunity for a detailed analysis of precisely how an administrative agency "makes" policy at the grassroots implementation level and whether such policy making is -- or could be -- performed effectively and in a manner consistent with democratic theory.[35]

Interestingly, OCR's civil rights enforcement responsibilities are similar to the functions many courts have undertaken in recent years in institutional reform litigations, which also involve them in formulating compliance standards and monitoring their implementation.[36] It is not merely coincidental, therefore, that questions analogous to those concerning the "legitimacy" of administrative agencies undertaking policy-making roles under a broad delegation of authority and their capacity to do so, have been lodged against the "judicial activism" of the courts.

Because the present authors developed a specific methodology for analyzing the legitimacy and capacity of the courts' new policy making functions in their prior study of educational policy making and the courts,[37] a comparative institutional framework is readily available for assessing OCR's activities. Under that framework, the legitimacy of an institution's intervention into the administration of educational programs can be considered in terms of (1) the "principle" or "policy" basis of the decisions made and (2) the extent of involvement of affected groups and individuals. The effectiveness of the intervention can be assessed in terms of the institution's capability (3) to undertake complex social science fact-finding processes and (4) to effectuate specific remedial reforms.

In summary, then, we will view OCR's attempt to enforce federal anti-discrimination law in the New York City school system through three different lenses: the ideological perspective, the implementation perspective and the comparative institutional perspective.

Specifically, the study is organized as follows. Part I will set the stage for the ideological analysis by defining the fundamental American egalitarian ideology and its equality of opportunity/equality of result strands (Chapter Two), and for the implementation and comparative institutional analyses by describing the ambiguity in egalitarian policy standards as formulated by the courts (Chapter Three) and the Congress (Chapter Four). Part II will then recount the story of the Big City Review in New York City (with comparative insights obtained from similar reviews undertaken in Chicago, Los Angeles, and Philadelphia)[38] (Chapters Five-Seven). In Part III, we will analyze these events in terms of the ideological perspective (Chapter Eight), the implementation perspective (Chapter Nine) and the comparative institutional perspective (Chapter Ten). Final concluding comments will be presented in Chapter Eleven.

1 Press release statement of Martin H. Gerry, Director of OCR, January 18, 1977.

2 347 U.S. 483 (1954).

3 Pursuant to its authority under Title IX of the Education Amendments of 1972, which prohibit sex discrimination in federally assisted programs, OCR also looked for indications of denial of equal opportunities to female students in areas such as vocational training and career counseling as well as patterns of apparent under-representation of women in supervisory and administrative positions. After the issuance of HEW regulations pursuant to §504 of the Rehabilitation Act of 1973, the Review also added issues regarding equal educational opportunities for handicapped students.

4 An additional agreement on bi-lingual education issues was concluded in September, 1977, without major negotiations. This agreement largely was overshadowed by a pending lawsuit on bi-lingual education issues that already had produced a major consent agreement.

5 M. Rebell and A. Block, *Educational Policy Making and the Courts: An Empirical Study of Judicial Activism* (1982)

6 G. Allison, *Essence of Decision* (1971). Allison undertook to explain the Cuban missile crisis in terms of three separate models: "rational actor"; "organizational process" and "governmental politics".

7 P. Peterson, *School Politics Chicago Style* (1976). Peterson applied Allison's approach to the educational context and analyzed decision making by the Chicago Board of Education on the issues of desegregation, collective bargaining and decentralization, in terms of "rational decision making"; "organizational process" and "bargaining" (both "pluralist" and "ideological").

8 These "perspectives" are analogous to social science "models", but we prefer to utilize the former term in order to make clear that we do not purport to be constructing methodologically

rigorous models; instead, we seek to present three coherent, and interrelated frameworks for understanding the nature and causes of the events in the New York Review.

9 Peterson, n. 7, supra at 137.

10 D. Bell, The End of Ideology, 400 (rev. ed. 1962).

11 MacIver, "Introduction" to European Ideologies 5 (Gross, ed. 1948).

12 We use the phrase "fundamental ideology" to describe a core set of values and understandings about social equality. This fundamental ideology is less comprehensive in scope than what the German sociologist Karl Mannheim called a "total ideology" (referring to an all-inclusive world view, or a total mind set of an epoch or a group) in his classical book, Ideology and Utopia (1929). However, it shares with Mannheim's concept the notion of a broad umbrella perspective of values and concepts which encompasses specific ideological subcategories. All of the major individuals and organizations involved in the New York Review shared this fundamental American egalitarian ideology. Under this umbrella perspective, however, sharp differences arose which will be discussed below.

13 We prefer to use the term "ideological strands" in preference to Mannheim's "particular ideologies". The latter term includes negative connotations of ties to narrow interests. "Strands" implies a complementary relationship which, as will be discussed below, accurately describes the connection between equality of opportunity and equality of result, as we define these terms.

14 For example, from the result perspective one will more readily find discriminatory bias in institutional arrangements (e.g., organizing classrooms by ability groups) and social processes (e.g., teacher judgments of student "ability") that are ostensibly neutral but have disparate results.

15 "Title VI of the 1964 Civil Rights Act emerged from Congress without a definitive legislative history to serve as an explicit directive for administration." B. Radin, Implementation, Change and the Federal Bureaucracy: School Desegregation Policy in HEW, 1964-68, 92 (1977).

16 *See*, *e.g.*, W. Muir, *Prayer in the Schools* (1967); *See also* T. Becker and M. Feeley, *The Impact of Supreme Court Decisions* (2d ed. 1973); Hollingsworth, "The Impact of Student Rights and Discipline Cases on Schools," in ERIC, II Schools and the Courts (1979) 45; Miller, "On the Need for 'Impact Analysis' of Supreme Court Decisions," 53 Geo. L.J. 365 (1965).

17 "During the first 7 years of Title I alone, over $50 million was spent on impact evaluations (M. McLaughlin, *Evaluation and Reform: The Case of ESEA, Title I* 180 (1975)); Kirst and Jung, "The Utility of a Longitudinal Approach in Assessing Implementation: A Thirteen Year View of Title I, ESEA," Program Report No. 80-B18, Institute for Research on Educational Finance and Governance, Stanford University 34 (1980).

18 E. Hargrove, *The Missing Link* (1975).

19 Kirst and Jung, *supra*, n. 20 at 3. Examples of "factually dense" implementation studies are E. Mosher and S. Bailey, *ESEA: The Office of Education Administers A Law* (1968); *Federal Aid to Education* (J. Berke and M. Kirst, eds. 1972). Also, although not denominated an "implementation study", G. Orfield, *The Reconstruction of Southern Education* (1969) can nonetheless be seen as one. *See* Sabatier and Mazmanian, "The Implementation of Regulatory Process: A Framework of Analysis," ns. 2-7 (Research Reports of the Institute for Government Affairs, No. 39 Davis, California, University of California Press, 1979); March, "Footnotes to Organizational Change," ns. 2-5 (Institute for Research on Educational Finance and Governance, Project Report No. 80-A6, 1980).

20 For a discussion of borrowings from various disciplines, *see* E. Hargrove, *supra* n. 21. For an attempt to use a specific political/economic theory -- utilitarianism -- to explain the history of the desegregation of Southern schools, see H. Rodgers, Jr. and C. Bullock, III, *Coercion to Compliance* (1976). *Cf*. *Social Program Implementation* (W. Williams and R. Elmore, eds. 1976).

21 *See*, *e.g.*, Van Meter and Von Horn, "The Policy Implementation Process" 6 Administration and Society 445 (1975); Berman, "The Study of Macro- and Micro-Implementation," 26 Publ. Pol. 157 (1978).

[22] E. Bardach, *The Implementation Game* 57 (1977).

[23] Majone and Wildavsky, "Implementation as Evolution" included as Chapter 9 to Pressman and Wildavsky *Implementation* (2d ed., 1979).

[24] This approach is the core of Allison's "rational actor" model. Applying this perspective to the behavior of a corporate entity with divergent internal goals is referred to as the "anthropomorphic fallacy." Allison, *supra* n. 6, at 265.

[25] The implementation perspective also protects against the tendency to immediately attribute failures to particular institutional shortcomings; instead it promotes a comparative institutional consideration of inherent implementation problems.

[26] *See e.g.*, Berman, "The Study of Macro and Micro Implementation," 26 Publ. Pol. 157, 166 (1978), The implementation problems caused by "policy ambiguity" are well illustrated by Clune's comparison of the relatively clear fiscal equalization policy enunciated by the California Supreme Court in *Serrano* v. *Priest*, with the amphorous goals of "thorough and efficient" education articulated by the New Jersey Supreme Court in *Robinson* v. *Cahill*, both in response to similar legal challenges to the state system for educational finance. Clune "Serrano and Robinson" in II *Schools and the Courts* 67-120 (1979).

[27] This organizational process approach is related to Allison's second model. See Allison, *supra* n. 6. *See also* Elmore, "Organizational Models of Social Program Implementation" 26 Publ. Pol. 185 (1978), and M. Lipsky, *Street-Level Bureaucracy* (1980).

[28] This variable is related to Allison's third model. *See also*, Bardach, *supra* n. 22.

[29] *See generally* Sharp, "The Classical American Doctrine of 'The Separation of Powers'" 2 Chi. L. Rev. 385 G. Shubert, *Judicial Policy-Making* (1974).

[30] *See e.g.*, J. Landis, *The Administrative Process* (1938); L. Jaffee, *Judicial Control of Administrative Action* (abridged ed. 1965); K.C. Davis, *Discretionary Justice* (1969); Wright, Book Review, 81 Yale L.J. 575 (1972) (reviewing K.C.

Davis, *Discretionary Justice* (1969)); Stewart, "The Reformation of American Administrative Law," 88 Harv. L. Rev. 1669 (1975).

31 *See* *Buckley* v. *Valeo*, 424 U.S. 1, 280-281 (1976) (White, J., concurring and dissenting)

32 J. Freedman, *Crisis and Legitimacy; The Administrative Process and American Government* (1978). In addition to fundamental separation of powers problems, Freedman attributes this "crisis" to departures from judicial norms, public ambivalence about economic regulation in general, and public concern with bureaucratization and administrative expertise.

33 The Supreme Court has invalidated legislation for reasons of improper delegation only on two occasions (*Panama Refining Co*. v. *Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp*. v. *United States*, 295 U.S. 495 (1935), leading many to conclude that the doctrine of constitutional limitations on legislative delegation is dead. As may be expected, there are some that argue for its revival, (e.g. T.J. Lowi, *The End of Liberalism: Ideology, Policy and the Crisis of Public Authority*, 298 (1969); *See also*, McGowan, "Congress, Courts and Control of Delegated Powers," 77 Colum. L. Rev. 119 (1972)); and others who call for other methods of insuring administrative accountability (e.g., Davis, *supra*, n. 30; Stewart, *supra* n. 30, at 1695-96. One member of the Supreme Court appears to be interested in reviving the delegation doctrine, (*See* *e.g*., *Industrial Union Department* *AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 809 (1980), Rehnquist, J., concurring.), but it is not yet clear whether this is the beginning of a serious new trend or is a "doctrinally extraordinary approach" which is not likely to be further developed. (Diver, "Policy Making Paradigms in Administrative Law", 95 Harv. L. Rev. 393, 427 (1981). State courts have invoked the delegation doctrine more often (*see e.g*., *City of Saginaw* v. *Budd*, 381 Mich. 173, 160 N.W. 2d 906 (1968); *State Compensation* *Fund* v. *De La Fuente*, 18 Ariz. App. 246, 501 P.2d 422 (1972); *Sarasota County* v. *Barg*, 302 So.2d 737 (Fla. 1974); *People* v. *Tibbits*, 56 Ill.2d 56, 305 N.E. 2d 152 (1973).

34 Critics of broad delegation argue for clearer statutory standards, improved agency rate-making pro-

cedures, new accountability mechanisms or clearer standards forjudicial review. See Wright, supra, n. 30, Jaffee, supra, n. 30, Stewart, supra, n. 30. One major school of thought on the delegation problem believes that a substantial amount of delegation of policy-making responsibilities to administrative agencies can be tolerated, consistent with separation of powers ideals, so long as the regulatory scheme provides for meaningful scrutiny and participation by the public in agency rule making (as well as adversary procedures for administrative and judicial review of adjudicatory decisions.) See Davis, supra n. 30 at 219.

35 OCR is, of course, a "dependent" administrative agency subject to direct political control by the Secretary of Education, and its civil rights enforcement responsibilities differ from the economic regulatory responsibilities of the traditional "independent" regulatory agencies such as the I.C.C. and the F.T.C. But given the extent of responsibility routinely delegated to all government regulatory or social service agencies and the converging degree of political influence on both types of agencies today, the dependent/independent distinction, for present purposes, has little significance. See e.g., U.S. Senate Committee on Governmental Operations, Study on Federal Regulation, 95th Cong., 1st Session, Vol. I, p. v (1977), G. Calabresi, A Common Law in the Age of Statutes 45, 56 (1982). And although the differences between OCR's civil rights enforcement activities and the economic and social regulatory responsibilities of other agencies must be kept in mind, the major problems of delegation, public participation, fact finding and analytic capabilities are highly similar. See, e.g., L. Lave, The Strategy of Social Regulation: Decision Frameworks for Policy 135 (1981).

36 See e.g., Chayes, "Forward: Public Law Litigation and the Burger Court", 96 Harv. L. Rev. 1, (1982); Chayes, "The Role of The Judge in Public Law Litigation," 89 Harv. L. Rev. 1281 (1976); D. Horowitz, The Courts and Social Policy , (1977); O. Fiss, The Civil Rights Injunction (1978); "Symposium: Judically Managed Institutional Reform," 32 Ala. L. Rev. 267-464 (1981).

37 Supra, n. 5

38 Full in-depth case studies were not undertaken in these cities, but the main participants were interviewed and the agreement and other major documents obtained and analyzed. For a list of individuals interviewed in these cities, see the Appendix.

PART I

THE LEGAL, LEGISLATIVE AND IDEOLOGICAL BACKGROUND

CHAPTER TWO

AMERICAN EGALITARIAN IDEOLOGY

I. Equality and The American Tradition

The American colonies, more than 200 years ago, announced their Declaration of Independence to England and the world by declaring as a self-evident truth "that all men are created equal." In essence, "[t]he equal legal and moral status of free individuals was America's reason for independent existence."[1] The American Republic established the concept of equality as a revolutionary, democratic principle in the eighteenth century and egalitarianism has remained a dominant concern of American politics ever since.[2]

America's unique role as the midwife of egalitarianism in modern history can be traced primarily to three factors. First was the image and the reality of its geographical location in a "new world." The allure of an unsettled continent of virgin territory, separated by thousands of miles of ocean from the turmoil, the discontent, and the inequities of the European continent made

America seem the veritable "promised land" of biblical imagery. As Herman Melville put it:

> Escaped from the house of bondage, Israel of old did not follow often the ways of the Egyptians. To her was given an express dispensation; to her were given new things under the sun. And we Americans are the peculiar, chosen people -- the Israel of our time; we bear the ark of the liberties of the world.[3]

This hope of new beginnings, new beginnings on the basis of fundamental equality, has ever been the allure of the new world to the oppressed and impoverished inhabitants of the old.[4]

The second important aspect of America's early experience for the development of egalitarianism lay in its unfettered committment to liberal ideals. As Louis Hartz has convincingly demonstrated,[5] the original American colonists brought with them from Europe a strong commitment to Lockean liberalism. Locke's political theory was based on the development of certain "self-evident" propositions of natural law which were discernable through the reasoning faculty equally possessed by all men. Lockean liberalism, therefore, emphasized the dignity of each individual, his equal role in the establishment of the political state and the corresponding obligations of that state to promote each individual's self-development. This liberal ideal was able to take root and thrive in the virgin American soil, free from the ideological competition of the feudal heritage of

England and other European countries.

The third egalitarian dimension of the original American experience was its strong rejection of the status orderings of European society. "The dispossessed emigrants who set the tone of American society were in revolt against the patronizing airs of European snobbery..."[6] Although economic differentials have always marked the American scene, the absence of a hereditary elite class and entrenched privilege has led commentators from early times to the present to emphasize the unparalleled "equality of esteem"[7] that marks social relationships in the United States. Alexis de Toqueville summarized this phenomenon in writing of his travels to America in the 1840's as follows:

> Many important observations suggest themselves upon the social conditions of the Anglo-Americans, but there is one that takes precedence of all the rest. The social condition of the Americans is eminently democratic; this was its character at the foundation of the colonies, and it is still more strongly marked at the present day.[8]

In short, then, America's unique new world setting, its unfettered adherence to the liberal ideal, and its insistence on a revolutionary break with aristocratic trappings com-bined to create an egalitarian credo based on the "...ideals of the essential dignity of the individual human being, of the fundamental equality of all men, and of certain inalien-able rights to freedom, justice and a fair opportunity [which] represent to the American people the essential meaning of the nation's early struggle for independence.[9] This egalitarian credo marked a new era in world history. It symbolized for the nation's citizens, and for the established political orders throughout the world, a radical break with past assumptions concerning the limits of human nature and of the human condition.

Egalitarianism, by its very nature, is a revolutionary doctrine. "Once loosed the idea of Equality is not easily cabined."[10] As de Toqueville put it (not without some foreboding),

> It is impossible to believe that equality will not eventually find its way into the political world, as it does everywhere else. To conceive of men remaining forever unequal on a single point, yet equal on all others, is impossible. They must come in the end to be equal upon all.[11]

Despite these predictions, however, American society clearly has not achieved the full flowering of equality that de Toqueville and other early commentators had anticipated. To be sure, in certain areas, like extension of the franchise, egalitarian practices which the founding fathers would have considered radical, have been implemented.[12] But these have not been accompanied by equal sharing of political power or by equal distribution of wealth.

The dynamic economic growth of the American economy has, of course, substantially reduced the prevelance of the kind of grinding poverty which was experienced by the masses in traditional European society, and continues to be the plight of peasant populations throughout much of the world today.[13] However, in terms of the relative distribution of wealth, proportionate holdings of the top and bottom strata of society have remained remarkably constant throughout American history.[14] And, significantly, despite the promise of its original egalitarian revolution, the contemporary patterns of economic distribution in the paradigmatic new world society are scarcely different from patterns of distribution in the old world European societies: income differentials in the United States today are roughly similar to those of the European democracies.[15] Such patterns of relative economic inequality are, of course, causally related to the perpetuation of political inequalities.[16]

The main reason for America's failure to develop fully and consistently its initial egalitarian potential is apparent: America's liberal vision also incorporated the capitalistic ethic and related goals of economic development; and equality and economic efficiency are fundamentally incompatible.[17] Paradoxically, America became the prime locus for the flowering of the capitalistic ethic in the modern world for many of the same reasons that it developed the new egalitarian credo. Its tabula rasa environment allowed unfettered development of a Lockean liberal ideal that emphasized the virtues of "equal" opportunity through untrammeled individual self-development. When combined with Calvinist notions of the righteousness of material accumulations[18] in an environment where traditional social and economic barriers to individual enterprise held little sway, Lockean individualism accelerated the development of the capitalistic ethic.[19]

Thus, even at the time of de Toqueville's visit to America when the expansion of Jacksonian democracy was in its heyday, counter-trends of wealth and position stemming from economic enterprise were already beginning to take hold.[20] In the decades which followed, the accession of the industrial revolution further fueled the original capitalistic ethic and caused the pursuit of economic development to dominate the American scene.[21] Given the vigor of the capitalist ethic in American history, it might well be wondered why the egalitarian credo did not become even more submerged on the American scene? Despite an intitial favorable climate, the weight of two hundred years of intense capitalistic economic development might have been expected to stifle egalitarianism and result in marked hierarchical social ordering, at least as compared with the

European democratic societies.[22] Although centralizing trends inherent in advanced industrial economies may create preconditions for expanded governmental activities, and welfare state expectations,[23] the South African example has shown that industrialization and centralization can also lead to an expansion of privilege and hierarchy.[24]

In the absence of the Marxist and socialist ideological pressures which have impelled egalitarian development in the European social democratic societies,[25] some other motive force must have been at work in the American environment. That factor, clearly, has been the intense racial dynamic of American history which paradoxically has combined intense adherence to Lockean natural law ideals with probably the most oppressive slave society known in post-Renaissance times.[26] The unfolding of this paradoxical dynamic during the last 150 years through the emergence of the abolitionist movement, the renewed repressions of the Reconstruction era, and the civil rights pressures of the 1950's and 1960's, has maintained a strong egalitarian drive throughout American history.[27] The explosive dynamic inherent in the American liberal credo has been described by Louis Hartz through a comparison with South America as follows:

> Since the inclusion of the non-Westerner into the human group at all requires full equality, during the era of slavery he is totally excluded by theories of either

> property or race which make 'liberal slavery' if we can use the term, harsher in practice then feudal. But by the same logic, once humanity is conceded, the liberal ethic is more compulsively generous, since it demands completely equal treatment.[28]

Thus, the resurgence of the egalitarian credo in contemporary America stems from the persistent American racial dilemma.[29] Because of the statistical correlation between race and poverty in this country, and the inherent trust of the egalitarian ideal once "uncabined," the strong pressures for racial equality in recent times have led to demands for greater economic equality[30] and also to strong egalitarian pressures in other, historically unprecedented areas such as women's rights and the rights of the handicapped.

In sum, the concept of "equality" in the American context is a complex phenomenon, emerging from two centuries of contradictory, yet complementary, idealistic and racist elements. Accordingly, America's fundamental egalitarian "ideology" encompasses a variety of egalitarian perspectives, and meanings,[31] which come into focus, in the political interchanges attendant upon implementation of specific social reforms.

The categories of "equality of opportunity" and "equality of result," defined in Chapter One, essentially constitute two analytic poles along a continuum of complex elements that constitute the fundamental American egalitarian ideology.32 Further elaboration of these ideological strands is necessary to set the stage for identifying the ideological differences between the main parties in the NYC/OCR case study, and tracing the influences of ideology on the course of events and the actual content of the Agreements.*

II. Equality of Opportunity:

As discussed above, the American liberal tradition was heavily influenced by the writings of John Locke. In contrast to conservative theorists, Locke assumed that all men are endowed with a substantial attribute of reason and are therefore equally capable of comprehending the laws of nature (which are based on reason) and agreeing to establish political institutions which will inure to the benefit of all. Reason further shows us, according to Locke, that "God has given us all things richly"[33] and each individual in the "state of nature" was assumed to have staked out a fair share of available pro-perty. Government institutions, therefore, were considered to be instituted as a "convenience" to regulate and promote the natural rights to life, liberty and property, which were the original legacies of all individuals in the state of nature.

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*Although the discussion which follows is phrased, for purposes of clarifying basic distinctions, in terms of "ideal type" poles of "equality of opportunity" and "equality of result," it is not meant to imply that the actual positions of OCR, the New York City Board of Education and other individuals or groups involved in this study strictly adhere to all aspects of the defined categories. The categories do, however, provide meaningful base points for tracing significant

Starting from these premises of fundamental natural equality and open access to nature's bounties, government for Locke can be said to exist for the purpose of promoting "equality of opportunity" so that each person can continue to develop fully his individual talents and "property". The open fertile environment of the American continent, which had been analogized by Locke himself to his ideal original state of nature,[34] provided a logical locus for the flowering of such equal opportunity.

It is, however, precisely in the pursuit of these individual opportunities that the inherent conflict between the two basic strands of liberal thought, equality and liberty, comes to the fore.[35] In order to enjoy an untrammeled path to the opportunities they seek, those individuals who emerged more successful in the social competition tended to emphasize the inviolability of particular liberties and property rights. They sought ways to assure the primacy of the pursuit of life, liberty and property and to uphold these values in the face of envy or egalitarian pressures of the masses of their less successful fellow citizens. In this connection, John Stuart Mill, expressed grave apprehen-

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ideological differences.

sions about the potential "tyranny of the majority" and articulated the need to establish certain basic rights, such as freedom of speech, as a bulwark for full development of the creative potential of those capable of outstanding achievement.[36]

In this way, "equality of opportunity" came to represent a balancing of the ideals of equality and liberty. Each individual was to be encouraged to develop fully his natural abilities and both the individual and society as a whole were expected to benefit from the resulting release of talent and energy.[37] Limited governmental intervention (such as anti-trust laws) would ensure that over-zealous pursuit of personal gain by one individual or entity did not unduly interfere with the "equal" potential of other individuals to similarly pursue their opportunities; at the same time, certain definitive rights were established to provide bulwarks for the "liberty" of self-fulfillment so that majoritarian "factions" could not stifle legitimate individual enterprise and expression. The resulting liberal ideal was summarized in 1878 by Ralph Waldo Emerson as follows:

> Opportunity of civil rights, of education, of personal power, and not less of wealth; doors wide open...invitation to every nation, to every race and skin,...hospitality of fair field and equal laws to all. Let them compete, and success to the strongest, the wisest, and the best.[38]

But the success of the strongest which Emerson toasted was not viewed in quite the same terms by all concerned. Karl Marx portrayed in devastating detail in Kapital the human degredation and misery caused by the free flowering of the capitalistic factory system. In order for the bourgeois entrepreneurs to fully exploit their economic opportunities, the system according to Marx, necessitated a simultaneous exploitation of those who were relegated to the lower levels of the competitive struggle.[39] In America, regulatory reforms such as minimum wage, maximum hour and occupational health and safety laws have taken some of the sting out of the such criticisms. But even with this better balancing of equality and liberty ideals, troublesome problems remain with the concept of equality of opportunity.

The crux of the matter, simply stated, is that a broad opening of "opportunities" for individuals seems to create an inevitable conflict with thorough-going notions of "equality." John H. Schaar has forcefully pointed out that, "...virtually all of the demand for the kind of equality expressed in the equal-opportunity principle, is really a demand for an equal right and opportunity to become unequal."[40] Those with the greatest ability naturally tend to take advantage of opportunities provided and to push themselves to the top. In doing so, they create a new form of elitism which presents serious difficulties for equality and democracy, however well-earned the achievements of the successful may be.

Thus, ironically, the liberal ethic which emerged historically as a reaction against hereditary orderings of feudal society has resulted in modern times in a system of merit-oriented status differentials at least as great as those of prior aristocratic ages.[41] These liberal status orderings, especially if they result from fair competitive interplay, tend to create more discord and dissension from the lower classes than did the inequitable but "natural" orderings of traditional, aristocratic societies. Henry Fairlie explains why:

> There could be no more certain prescription for inciting people to Envy [than equality of opportunity], for it leaves the majority of them, who do not succeed with no alternative but to see themselves as losers. In an equal race, as they have been told it is, they were defeated. If it is merit alone that is rewarded, as they have again been told, then they have been proved to have little or none. But one cannot ask people to accept so sweeping and blindfold a dismissal of their own abilities , and this is one reason why what is so pretentiously described as a meritocracy is popularly described as a rat race.[42]

These problems of envy might be considered an unfortunate, but, nevertheless, legitimate, by-product of the competitive struggle -- if the competitive struggle were fairly pursued. But, in fact, it almost never is. Equality of opportunity is often analogized to a footrace, in which the field is open and those who fairly outpace the others are entitled to their prize. Contemporary advocates of equality of opportunity reconize a need to remove discrimination hurdles that in the past blocked the paths of some of the runners. In reality, however, critics charge that removal of all the long-entrenched barrers, especially those created by the long history of slavery and state-mandated segregation, is an extermely difficult -- if not insuperable -- task.[43]

In addition to the problems of eliminating the barriers on the field, an additional and conceptually even more difficult issue is presented by the fact that at the very starting block, some of the competitors are disadvantaged, since they weighted down with unfair handicaps and burdens stemming from prior economic or social position. Given these realities, in what sense can it be said that there is an equal opportunity to run the race of life?

To be fully fair, society would need to compensate for these initial disadvantages before the life race has begun.[44] Traditionally, the notion of equal educational opportunity has been advanced as the prime conceptual approach for providing such compensation. In the nineteenth century, John Stuart Mill advocated guaranteeing all children a basic level of educational services to be provided in the first instance by their parents under compulsory legal pressure, or, in the case of poverty stricken individuals, ultimately by the state.[45] Mill's notions have since been expanded, especially in the United States, into a widespread belief that access to a compulsory system of common, public schools would provide children of all classes and backgrounds with the knowlege and motivational skills necessary to overcome initial socio-economic deficiencies. Recent research, however, has indicated that the schools, at least as they have traditionally operated and at levels of traditional resource committment, have not been able to accomplish this enormous task.[46]

Disillusionment with the society's historical failure to provide meaningful opportunities to the underprivileged has led some commentators to conclude that society must go beyond providing equal educational opportunities and must take steps to overcome the most basic differentials in family wealth and other environmental limitations.[47] To be fully consistent on this point, it would probably be necessary to massively interfere in private lives by radically restructuring job allocation procedures,[48] constantly redistributing wealth and prohibiting inheritance rights[49], raising children apart from their parents or even tampering with initial gene pools.[50]

In sum, then, full implementation of the ideal of equality of opportunity seems to imply a social obligation to remove or compensate for "accidental" handicaps which disproportionately burden certain of the competitors before life's competition has begun. But there is no logical stopping point once society begins to take seriously the prospect of eliminating such initial disabilities. Obviously, somewhere, reasonable lines must be drawn. Nevertheless, one retains a gnawing awareness that those who are left on the "disadvantaged" side of the line, retain a strong moral argument for complaining that the life race is unfair.[51]

III. Equality of Result

As was indicated in Chapter One, advocates of "equality of result" differ with proponents of "equality of opportunity" in their skepticism about the degree of meaningful opportunity actually being given to the disadvantaged, and in their belief that structural reforms are necessary to provide such opportunity.[52] Although they share the Lockean liberal premises of America's fundamental egalitarian ideology, their differences emerge at the stage of implementing remedies to overcome past discrimination and injustice; in this sense, the evolution of increasingly result-oriented remedial orders by the federal courts in enforcing the mandate of Brown has had a significant formative influence on contemporary egalitarian thought. The judicial influence on result-oriented egalitarian thinking will be discussed in detail in the next chapter. This section will consider the other major source of American result-oriented approaches, namely the writings of the school of radical, but largely non-Marxist, theorists whose views have directly or indirectly inspired result-oriented political activists. *

Radical political theorists tend to be optimistic about the possibilities of human nature. Although they do not ignore the obvious differences in natural talents and attributes among individuals,[53] they believe that removal of social injustice will permit each individual to develop an unprecedented range of personal abilities.[54] And, even if in final analysis, it is true that all people will never be equal in their abilities and accomplishments, these thinkers would hold that each individual nevertheless is entitled to basically equal treatment:

> "'All men are created equal' is not a declarative sentence; it is an imperative. It is not a statement but an exhortation. It is not an affirmation or description. It is a command...It says in substance, within certain limits and for certain purposes, that we should treat all men as if they were the same, although we know full well that they are not.[55]

The most influential statement of the result-

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*Although some of these ideas (or their implications) may be more "radical" than the position which would be espoused by particular result-oriented civil rights activists focusing on a more immediate limited agenda, it is important to outline the theoretical perspective of this school because it constitutes the only consistently developed philosophical underpinning for the result perspective -- and because opponents of the equality of result approach tend to associate all adherents with these radical views.

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oriented radical egalitarian perspective in contemporary American thought is John Rawls' much heralded book, A Theory of Justice. Rawls builds his theory from liberal utilitarian and social contract principles, rather than from Marxist precepts. He posits an original position under a "veil of ignorance" in which "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like."[56] From this perspective, it becomes clear for Rawls that rational individuals, being ignorant of what life may actually have in store for them, will establish a society which attempts to avoid or minimize all inequities, whatever their origin.

Specificially, he argues that rational individuals would adopt two basic principles. The first would require full equality in the assignment of basic civil and political rights; the second would permit particular social and economic inequalities only if they would result in increased benefits for all, and particularly for the least advantaged members of society. This second principle means that:

> "...in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions. The ideal is to redress the bias of contingency in the direction of equality."[57]

In practice, Rawls' theory would require the provision of greater resources for the education of the least, rather than the most, intelligent, at least in the early years of schooling. Or, if it is determined that the welfare of society as a whole (and especially those who are presently most disadvantaged) would justify providing richer educational opportunities for those with greatest ability (who might then be capable of achievements which would benefit all), the Rawlsian principle would hold that such individuals have no moral right to expect enhanced economic rewards merely because of their greater accomplishment.[58]

In essence, the equality of result approach, exemplified by Rawls, seeks to rectify the major flaw of the equality of opportunity perspective by maximizing the ability of each individual to compete on a fair basis.[59] Thus, the "result" they seek is a realistic fair opportunity -- i.e. "more equality", rather than a complete equality of condition.[60] But in attempting to rectify the inherent problems of the opposing school, the equality of result perspective also raises additional conceptual and practical difficulties of its own. The first of these stems from the inherent tension between "equality" and "liberty". Attempts to implement egalitarian results, especially through large scale structural reform, inevitably impedes the liberty of many individuals who are adversely affected by the reforms.[61] (The impact of the affirmative action admissions system on "innocent" white applicants like Alan Bakke is a frequently cited example.) Some have gone so far as to posit that assurance of a thorough-going equality of result may require imposition of governmental authority to a degree that is incompatible with retention of traditional American liberty values.[62]

Rawls was not unaware of this problem. Accordingly, he emphasized that his two principles of justice are to be perceived in lexical order "and therefore the claims of liberty are to be satisfied first."[63] But if Rawls' recommendations for substantial redistributions of wealth, power and prestige under his second principle are to be taken seriously, it is likely that substantial continuing regulatory compulsion will be needed to effect compliance with that goal.[64]

The second major problem inherent in the equality of result approach is its failure to provide a consistent theory of economic incentive. The strength of the classical liberal doctrine of equality was, of course, its ability to do just that. In viewing life as a competitive struggle, classical liberalism emphasized motivation, individual incentive, and the consequent potential for enormously expanding the wealth of the society as a whole. Radical egalitarians, by way of contrast, although not advocating socialist distributions, have always been more concerned with the slicing of the pie than with expanding its radius.[65]

Radical theory essentially postulates that economic scarcity will at some future stage of history be eliminated. This premise has increasingly been shown to be highly dubious. The pattern of industrial development to date has been an invariable correlation between advances in economic productivity and parallel increases in material demands. Thus, even though a reincarnated representative of our great grandparents' generation might presume that the ubiquity of television sets and indoor plumbing in modern America means that widespread poverty has been eliminated, millions of Americans are still "poor" because they lack additional material comforts which are now considered necessary for a decent life.[66] Furthermore, the shock of the oil crisis of the last decade and the resultant realization that there may be ecological limits to growth[67] means that, even in absolute terms, scarcity pressures may increase, rather than decrease, in the years to come.[68]

The third problem is that many radical egalitarian theorists assume that hierarchical orderings can largely be eliminated from human society.[69] Recent sociological theory has raised serious questions concerning the premises behind these views, and indicates that substantial social stratification may be an inevitable and unavoidable dynamic of the functioning of human societies.[70] Most important in this regard is the concept of authority. No organization can be administered without some degree of authoritative direction and control; even Engels, who spoke of the withering away of the state, "nevertheless declared that it would be impossible to think of any great, modern industrial enterprise or of the organization of the future communist society without authority -- or superiority-subordination relationships.[71] Even if one assumes that all (or more) men and women are equally capable of assuming leadership roles, some differential rewards, whether in the form of money, power or prestige would appear to be necessary to induce some of them to accept the stress, burdens and responsibility that accompany leadership positions.[72]

In short, then, radical egalitarian theories are premised on assumptions concerning the compatibility of liberty and equality values, the availability of ample resources and the elimination of social hierarchies which, under even the best of forseeable conditions, seem unattainable.[73]

Social commentators since de Toqueville have consistently stated that equality is a keynote of the modern age, "the capstone of a revolutionary attempt to establish a social science, a philosophy...a religion fit to be learned and followed by all mankind."[74] However, as we have seen, neither of the American egalitarian ideological strands seems to provide consistently satisfying doctrinal tenets by which contemporary society can actually practice this "religion."

Equality of opportunity is most consistent with the tenets of individualism and liberty, and it tends to promote a dynamic outpouring of energy, enterprise, and accomplishment. At the same time, however, this approach can create serious new inequalities, and it has no real answer to the gnawing problems of unfair initial starting points and persistent discriminatory hurdles. Equality of result purports to provide solutions for these deficiencies, but in doing so, it raises other substantial concerns in terms of the preservation of personal liberties, economic and positional scarcity and effective administration of the social order.

The conceptual problems raised by both schools of American egalitarian thought are serious and, perhaps, ultimately, insoluble. Under these circumstances, theory can provide insights for political action and can sensitize the actors to the problems and possibilities of certain courses of action. But it cannot provide definitive answers on how to deal with fundamental inequities or how the competing social values should be reconciled or balanced in practice.

Perhaps this explains why the courts, whose institutional orientation is to reconcile competing values and interest in the process of applying abstract principles to immediate factual problems, have played such a dominant role in the development of American egalitarianism in recent years. Accordingly, we will turn in the next chapter from the realm of egalitarian theory to the realm of egalitarian practice, by considering how egalitarian controversies have been handled by the courts.

[1] J.R. Pole, *The Pursuit of Equality in American History* ix (1978).

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> "The people of Britain's North American colonies were the first subjects of any of Europe's colonial empire to claim their independence of the Old World. They justified that claim by an appeal to the principle of human equality, to which they accorded the status of a 'self-evident truth.' The concept of equality, thus proclaimed in the rhetoric of American independence, entered into the principles of government, where it linked forces with demands arising from newly released sources of popular power. *Id*. at 1. *See also* Beck, "Forward" in M. Lewis, *The Culture of Inequality* (1978).

[3] Quoted in R. Bellah, *The Broken Covenant* 38 (1975).

[4] *See*, *e.g*., O. Handlin, *The Uprooted* (2d ed. 1973).

[5] L. Hartz, *The Liberal Tradition in America* 1955). For an interesting discussion of the manner in which Lockean ideas were conveyed to colonial Americans through the play of oppositionist politics, *see* B. Bailyn, *The Origins of American Politics* (1967). *See also* C. Becker, *The Declaration of Independence* (1942); Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought." 30 Stan. L. Rev. 843 (1978); *Cf*. G. Wills, *Inventing America* (1978).

[6] M. Young, *The Rise of the Meritocracy* 43 (1962). America's sharp rejection of aristocratic trappings was definitively articulated by provisions appearing both in the original Articles of Confederation and in the final version of the Constitution that declared:

> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office or Title, of any kind whatsoever, from any King, Prince or foreign State.

U.S. Const. art. 1, section 9; *cf*. *Articles of Confederation,* art. 6.

[7] J. Pole, *supra*. n. 1, at 42. *See also* Runciman, "The Three Dimensions of Social Inequality" in A. Beteille, *Social Inequality* 45, 49 (1969). Although plantation owners in the South had some pretensions toward aristocratic mores, they were never able to transplant a viable feudal-type order to the American environment. *See* Hartz, *supra* n. 5, Part Four. Ironically, the

enslavement of blacks in the South brought together the poor whites and wealthy landowners and tended to promote equality and democracy within white society as a whole. See J. Pole, supra n. 1, at 33.

8 de Toqueville, Democracy in America 48 (Vintage ed., 1945). de Toqueville added that:

> America, then, exhibits in her social state an extraordinary phenomenon. Men are there seen on a greater equality in point of fortune and intellect, or, in other words, more equal in their strength than in any other country of the world, or in any age of which history has preserved the rememberance. Id. at 55.

9 G. Myrdal, An American Dilemma 4 (1942).

10 Cox, "Forward: Constitutional Adjudication and the Promotion of Human Rights; The Supreme Court, 1965 Term," 80 Harvard Law Review 91 (1966).

11 de Toqueville, supra n. 8 at 55. See also Black, "Forward; 'State Action'; Equal Protection, and California's Proposition 14; The Supreme Court, 1966 Term" 81 Harv. L. Rev. 69 (1967). Tawney described the phenomenon in terms of the inevitable movement of majoritarian democracy toward increasing egalitarianism:

> As the mass of the population becomes conscious of the powers which democracy confers, they naturally use them to press their demands. Tawney, Equality 30 (1921).

Roland Pennock has described a similar trend toward an inherent thrust toward equality in a legal system:

> By a process of association or suggestion, legal equality tends, especially through the operation of the courts, to extend beyond the logical limits of the original ideal. The ideal of law thus exerts a certain 'push' toward the idea of equality. R. Pennock, "Law's Natural Bent," 79 Ethics 222, 225 (April 1969).

12 Note in this regard the fears expressed by the conservative John Adams in 1776 in arguing against the extension of the franchise. Adams declared that if the franchise were tampered with, "new claims will arise; women will demand the vote; lads from twelve to twenty-one will think their rights not closely enough attended to; and every man who has not a farthing will demand an

equal voice with any other, in all acts of state." (John Adams to James Sullivan, May 26, 1776, in Works IX, 375-8, quoted in J. Pole, supra n. 1 at 43.) Two hundred years later, virtually all of Adams' predictions, incredible as they may have seemed to him at the time, have come true. Women, those who "have not a farthing" and even some of the "lads from twelve to twenty-one" (i.e., those over eighteen) now have been afforded the right to vote.

[13] For example, since 1936, the percent of American families below the official OEO proverty level has been cut from 56% to less than 10%. S. Lebergott, Wealth and Want 3 (1975). Lebergott goes on to demonstrate this point further by stating:

> In 1900, 15 percent of U.S. families had flush toilets; today 86 percent of our poor families do. In 1900, 3 percent had electricity; today 99 percent. of our poor do. In 1900, 1 percent had central heating; today 62 percent of the poor do. In 1900, 18 percent of our families had refrigeration, ice refrigeration; today 99 percent of our poor have refrigerators, virtually all mechanical. Id. at 7.

[14] For example, the share of wealth held by the richest 1% of the American population remained basically the same for the years between 1810 and 1969 and, in fact, is greater today then it was a century ago. J. Turner and C. Starnes, Inequality: Privilege & Poverty in America 19 (1976).

In terms of the relative income of all strata of American society, similar substantial disparities have persisted, with the lowest fifth of society receiving 4-5% of total money income, and the top fifth, 40-50%. H. Miller, Rich Man, Poor Man 49-50 (1971); L. Thurow, The Zero Sum Society 156 (1980). Turner and Starnes present a detailed year by year breakdown of relative income shares, which indicates some slight narrowing of the differentials in recent years.

Year	Lowest Fifth	Fourth Fifth	Middle Fifth	Second Fifth	Highest Fifth	Top 5 Percent
1973	5.5	11.9	17.5	24.0	41.1	15.5
1972	5.4	11.9	17.5	23.9	41.4	15.9
1971	5.5	11.9	17.4	23.7	41.6	15.7
1970	5.5	12.0	17.4	23.5	41.6	14.4
1969	5.6	12.3	17.6	23.5	41.0	14.0
1968	5.7	12.4	17.7	23.7	40.6	14.0
1967	5.4	12.2	17.5	23.7	41.2	15.3
1966	5.5	12.4	17.7	23.7	40.7	14.8
1965	5.3	12.1	17.7	23.7	41.3	15.8
1964	5.2	12.0	17.7	24.0	41.1	15.7
1963	5.1	12.0	17.6	23.9	41.4	16.0
1962	5.1	12.0	17.5	23.7	41.7	16.3
1961	4.8	11.7	17.4	23.6	42.6	17.1
1960	4.9	12.0	17.6	23.6	42.0	16.8
1959	5.0	12.1	17.7	23.7	41.1	16.3
1958	4.7	11.0	16.3	22.5	45.5	20.0
1957	4.7	11.1	16.3	22.4	45.5	20.2
1956	4.8	11.3	16.3	22.3	45.3	20.2
1955	4.8	11.3	16.4	22.3	45.2	20.3
1954	4.8	11.1	16.4	22.5	45.2	20.3
1953	4.9	11.3	16.6	22.5	44.7	19.9
1952	4.9	11.4	16.6	22.4	44.7	20.5
1951	5.0	11.3	16.5	22.3	44.9	20.7
1950	4.5	12.0	17.4	23.5	42.6	17.0
1949	3.2	10.5	17.1	24.2	45.0	18.3
1948	3.4	10.7	17.1	23.9	44.9	18.7
1947	5.0	11.8	17.0	23.1	43.0	17.2
1946	5.0	11.1	16.0	21.8	46.1	21.3
1945	3.8	11.0	17.2	24.0	44.0	17.6
1944	4.9	10.9	16.2	22.2	45.8	20.7
1941	4.1	9.5	15.3	22.3	48.8	24.0
1935-36	4.1	9.2	14.1	20.9	51.7	26.5
1929	(12.5)		13.8	19.3	54.4	30.0

Id. at 51. The most recent census figures, however, reveal that income inequalities at the ends of the income ladder increased in the decade from 1970 to 1980. During the time span, the percentage of families with incomes of $35,000 or more rose from 14.8 to 19.5, while the percentage of those with incomes below $10,000 rose from 17.8 to 18.9. Pear, "Inflation Wiped Out Gains in Earnings in 70's," *The New York Times*, April 25, 1982, p. 1. For further discussion of the statistics on income distribution *see* Thurow and Lucas, "The American Distribution of Income: A Structural Problem," in L. Rainwater, *Inequality and Justice* 77 (1974), R. de Lone, *Small Futures: Children, Inequality and the Limits of Liberal Reform* (1979); Thurow, "The Pursuit of Equity," *Dissent* 253 (Summer, 1976).

The ravages of inflation in recent years, combined with the entrenched power of certain labor unions, appear to be resulting in some interesting redistribution trends, at least among particular groups within the middle range of the distribution tables. For example, between 1967 and 1978, the real increase in income of steel workers, corrected for inflation, was 34.9%, that of coal miners 31.1%, and of auto workers 25.4%, but college professors have suffered a decline of 7.1%, bank employees, a decline of 7.9%, and chemists, a decline of 2.2%. Those at the bottom of the American economy, *i.e.*, welfare recipients, however, have suffered the most, as their income has declined 16.5% over this period. *See* Blumberg, "White-Collar Status Panic," The New Republic, December 1, 1979, p. 21.

[15] Recent research indicates that in the United States, West Germany, the United Kingdom and Sweden, there is an approximate 8 to 1 ratio between the average income of the richest quartile and the poorest quartile. (Japan, interestingly, has only a 5 to 1 ratio.) A. Shostak, J. Van Til, and S.B. Van Til, *Privilege in America: An End to Inequality?* 28 (1973). *See also* L. Thurow, *The Zero Sum Society* 7-8 (1980). F. Parkin, *Class Inequality and Political Order* 118 (1971).

Parkin also discusses economic differentials in the communist countries of Eastern Europe, indicating that substantial differentials exist between the professional managerial class and other segments of those societies, although there is greater mobility to the upper classes than in Western society. (*Id.* at 149-155). Inequalities of distribution, especially in terms of power and prestige may, however, be greated than those which obtain currently in capitalist societies. (*See, e.g.*, H. Smith, *The Russians*, ch. 1 (1976); H. Matthews, *Class and Society in Soviet Russia* (1972); M. Yankowitch, *Social and Economic Inequality in the Soviet Union* (1977); M. Djilas, *The New Class* (1957)).

Other indicators of egalitarian distribution, such as proportions of the national budget spent on income transfer programs like social security also reveal lesser egalitarianism in the United States. For example, in recent years the United States has spent approximately 7.9% of its GNP on social welfare programs compared to 17.5% for Sweden, 19.6% for Germany, 18.3% for France, 14.4% for the United Kingdom and 10.1% for the USSR. H. Wilensky, *The Welfare State and Equality* 122 (1975). Wilensky asserts that the key variables explaining these figures for countries of similar economic levels are related to the length of time since social welfare programs were first implemented and the percentage of old people in the society. Distinctions between capitalist and socialist ideologies, he believes, provide relatively little explanation for these patterns.

[16] For further discussion of these issues *see* S. Miller and P. Roby, *The Future of Inequality* (1970); R. Titmuss, *Income Distribution and Social Change* (1962); H. Miller, *supra* n. 14; L. Rainwater, *Poverty in the United States*, in Rainwater, *supra* n. 14 at 70; A. Okun, *Equality and Efficiency* ch. 3 (1975); M. Weber, "Class, Status, Party" in *From Max Weber* (H. Gerth and C. Wright Mills, eds. 1958).

[17] *See* D. Bell, *The Cultural Contradictions of Capitalism* (1976). Bell notes that economic imperatives, especially those of an industrial-technological economy, are marked by an emphasis on functional rationality, bureaucratization and hierarchy. These factors are clearly inconsistent with an egalitarian ideal. Thus, although the status orderings of traditional aristocratic societies were relatively unknown in America, new status orderings based on bureaucratic norms and wealth emerged in America. *See also* E. Baltzell, *Puritan Boston and Quaker Philadelphia* ch. 2 (1979). Bell also discusses a third realm, that of "culture", which in recent years, he describes in terms of concepts of self-realization or self-gratification, which are inconsistent both with political ideals of equality and economic ideals of efficiency. *See also* R. Heilbroner, *The Limits of American Capitalism* (1965)).

[18] See M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (1905).

[19] Some critics have held that Locke's theories were in fact intended to provide a justification for bourgeois status differentiations and that Locke assumed that "equality" would only apply to a privileged elite. *See* McPherson, "The Social Bearing of Locke's Political Theory," in Schochet, *Life, Liberty and Property* (1971).

[20] J. Pole, *supra* n. 1, at 144.

[21] *See* M. Horowitz, *The Transformation of American Law 1780-1860* (1977) for an interesting discussion of how economic development concepts replaced traditional equity notions in American common law. The dominance of economic development perspectives, combined with the monopolistic hold of liberal ideology in America, explains why a socialist reaction, which developed after the outset of the industrial revolution in Europe, never

seriously took hold in the United States. See Hartz, supra n. 5, at 6. Ironically then, America, which had first brought the ideals of equality to world consciousness, divorced itself from the sustained further development of those ideals which occurred in Europe through the socialist movement. The substantial egalitarian pressures of European labor organizations and social democratic parties have had no real ideological counterpart in the United States.

[22] Although notions of egalitarianism, once loosed, may contain an inherent thrust toward further development (see notes 10 and 11, supra), at the same time it has also been noted that:

> Equality is the ideal which aims at the least natural of all political forms; we might say that it is the ideal which calls for the extreme denaturalization of the political order. To achieve inequality all we have to do is let things take their course. Not action but inaction is required. But if we are to achieve equality we can never afford to relax. G. Sartori, Democratic Theory 326 (1962). Cf. R. Nozick, Anarchy, State and Utopia (1974).

[23] See, e.g., L. Friedman, A History of American Law, Epilogue (1973); R. Unger, Law in Modern Society (1976).

[24] See generally G. Fredrickson, White Supremacy: A Comparative Study in American and South African History (1981). For a discussion of anti-egalitarian pressures of the "post-industrial" era of the 1980's, see P. Blumberg, Inequality in an Age of Decline (1980). Note also that in the American context the massive influx of waves of uneducated impoverished immigrants also created a natural tendency toward a resuscitation of hierarchical status differentials.

[25] See note 21, supra.

[26] The comprehensive study of the situation of the negro in the United States undertaken in 1933 by Gunnar Myrdal, the Swedish economist, which has since become a classic statement on the history of American race relations concluded that the racial situation had created a fundamental "American dilemma", marked by an unstable tension between ideals of justice and equality on the one hand and a reality of racial segregation and discrimination on the other. G. Myrdal, An American Dilemma (1942).

[27] For a detailed discussion of abolitionist concepts of natural right, see J. tenBroek, Equal Under Law (1965).

Note in this regard that although the ideology of the English abolitionism in the early nineteenth century emphasized humanitarian and religious ideals, American abolitionists built their theories on notions of inequality. J. Pole, *supra* n. 1 at 157-58. Thus Abraham Lincoln repeatedly harked back to the Declaration of Independence and its egalitarian ideals in justifying the emancipation of the slaves. *See* G. Wills, *Inventing America, Jefferson's Declaration of Independence* xiv ff. (1978).

Compare in this regard the South African experience which lacked both a deep-rooted commitment to liberal, natural law ideals and a thorough-going, repressive slave economy. Fredrickson, *supra* n. 24. Note also that the original "self-evident" propositions concerning the equality of all men which were forcefully pronounced in the American Declaration of Independence were not included in the provisions of the Constitution written two decades later. It was only with the adoption of the Fourteenth Amendment, following the Civil War and in response to abolitionist pressures to secure the rights of the newly freed slaves that the doctrine of "equal protection of the laws" became an explicit part of American higher law. *See* G. Wills, *supra* n. 5, for a discussion of the significance of the deletion by the Congress of those provisions of Jefferson's original draft of the Declaration which had explicitly referred to the evils of slavery, as inflicted on America by the British kings. *See also* R. Kluger, *Simple Justice* (1976) for a fascinating account of the slow but inevitable undermining of the "separate but equal" interpretation of equal protection.

[28] L. Hartz, *The Founding of New Society* 17 (1964).

[29] The rapid expansion of judicial activism and the development of equal protection doctrine initiated by the Supreme Court during the Warren era, centered. of course, on racial inequality. *See e.g.*, M. Perry, "Modern Equal Protection: A Conceptualization and Appraisal," 79 Colum. L. Rev. 1023 (1979), Brest, "The Supreme Court, 1975 Term; Forward: In Defense of the Anti-Discrimination Principle," 90 Harv. L. Rev. 1 (1976), K. Karst, "The Supreme Court, 1976 Term; Forward: Equal Citizenship under the Fourteenth Amendment," 91 Harv. L. Rev. 1 (1977). *See also Trimble v. Gordon*, 430 U.S. 762, 777 (1977), (Rehnquist, J., dissenting) -- Equal Protection outside the race context is "endless tinkering."

[30] "'One of the great puzzles of the 20th century, Charles Lindblom has observed, is that masses of voters in

essentially free democratic societies do not use their votes to achieve a significantly more equal distribution of income and wealth, as well as of the many other values to which men aspire...What needs explaining is why they do not try.' My argument is that such an effort will now be made." Bell, *supra* n. 17, at 226.

31 D. Rae, *et al*, argue in *Equalities* (1981) that abstract notions of equality are virtually meaningless. Egalitarian concepts take on meaning only in a specific political-implementation context. *See also* Westen, "The Empty Idea of Equality," 95 Harv. L. Rev. 537 (1982), *cf*. Burton, "Comment on Empty Ideas: Logical Positivist Analyses of Equality and Rules" 91 Yale L.J. 1136 (1982).

32 Both American egalitarian strands are rooted in the American liberal tradition. Therefore, as noted in Chapter one, they are distinct from the socialist oriented egalitarianism of Europe. They also are distinguishable from what might be termed a "conservative" concept of equality based on a notion of "equality of form". Aristotle discussed such a concept in terms of a notion of equality of distribution. In his view, justice was "a species of the proportionate." Aristotle, *The Nicomachean Ethics* Bk V, Chs 1-7, 10; *The Politics*, Bk 3, Chs 12, 13. It would be realized when "equals" obtained equal shares and "unequals" obtained "unequal" shares. The dictates of fairness and equality would be satisfied, from this perspective, if those who are entitled to a greater share of money, prestige, power, etc. within the hierarchical ordering received precisely that proportion to which they are entitled and no more. Thus stated, the conservative notion of equality emphasized fairness and formal proportionality and was consistent with the established order.

A more modern understanding of this concept of formal equality is implied in the concept of the "rule of law". *See*, *e.g.*, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1908). By assuring that legal requirements are known in advance and are fairly applied to all individuals and classes, the rule of law better assures that "equals" are properly treated equally and unequals are treated unequally; in egalitarian terms, however, this system does not purport to rectify any differentials in the power or positions of individual members of society or of the relative impact of the laws upon them. For interesting analyses of the implications of rule of law theories for equality, *see* Marshal, "Notes on the Rule of Equal Law," and Freedman, "Equality in the Administration of Justice" in R. Pennock and J. Chapman, *Equality* (1967). *See also* S. Lakoff, *Equality in Political Philosophy* (1964).

[33] J. Locke, Of Civil Government, ch. 5, para. 31.

[34] Id. at ch. 5, para. 49.

[35] "As for the principle of equal opportunities, liberal thought in the twentieth century adopts it as its own, but on two conditions: that it be understood as a development of individual liberty, and that it be realized by means that do not conflict with that end." G. Sartori, supra n. 22, at 336.

[36] See J.S. Mill, On Liberty (1859). Similarly, although (consistent with liberal egalitarian doctrines) he advocated a general expansion of the suffrage, Mill would limit those of lesser educational accomplishments to partial voting participation. J.S. Mill, Representative Government (1861). For a detailed analysis of the relationship between classical liberals (including James Mill, Bentham, Hobbes and Kant in addition to Locke), and equality see A. Gutmann, Liberal Equality (1981), especially chapters 1 and 2. Gutmann argues that the classical liberals failed to understand the importance of participatory democracy and redistribution for turning the liberal ideals into practical political concepts.

[37] The invitation, inherent in the Lockean notion of equality of opportunity, to those who were the "most industrious" to amass whatever degree of wealth their capabilities would allow, provided the nexus between liberal ideology and the capitalistic ethic discussed above at p. 4-6. Adam Smith's economic theories taught that the pursuit of economic opportunity by a large number of individuals would, through the beneficent workings of a mythical "invisible hand" harmonize personal gain with overall economic progress for the common welfare. In this way, difficult problems of conscience, especially for descendants of the ascetic Puritans were overcome. Since commercial prosperity sought through personal enterprise made a contribution to the public interest, "Feelings of guilt...could be assuaged by resort of ideas of equality...Men of wealth, rank and advantage could rest content with the unequal effects of their efforts." J. Pole, supra n. 1, at 37-38.

[38] Quoted in N. Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy 18 (1975).

[39] Correspondingly, from the conservative, or perhaps feudalistic perspective, George Fitzhugh, drawing on much of the same data concerning the sufferings of factory workers utilized by Marx, attacked the "wage

slavery" of the capitalistic system and compared it unfavorably with the "natural, paternalism" of plantation slavery. See G. Fitzhugh, Cannibals All! or, Slaves without Masters (1857).

40 Schaar, "Equality of Opportunity, and Beyond" in R. Pennock and J. Chapman, supra n. 32, at 238 .

41 See, e.g., J. Gardner, Excellence 5-6 (1961): "But the truth is that when men are released from the fetters on performance characteristic of a stratified society, great individual differences in performance will emerge, and may lead to peaks and valleys of status as dramatic as those produced by hereditary stratification. Many a feudal lord would have given his drawbridge to enjoy the power and glory of the industrial barons who pushed him into the history books."

42 H. Fairlie, The Seven Deadly Sins Today 75 (1979). A similar concept of the threat to the self-esteem of a majority of Americans caused by an inevitable "non-achievement of aspirations" under the liberal ethic is discussed in M. Lewis, The Culture of Inequality 15 (1978). Despite a greater degree of actual inequality, resentment by lower strata groups in Britain of their "betters" seems to be markedly less than might be anticipated because of the Englishman's acceptance of a natural stratification pattern and his tendency to compare himself only with closely-related "reference groups." See, e.g., J. Goldthorpe, "Social Inequality and Social Integration" in Rainwater, supra n. 14, at 32, 34-5.

43 One example of the difficulties involved in attempting to eliminate discriminatory barriers is provided by Owen Fiss' arguments concerning the ineffectiveness of the profit motive, which is assumed by many (see, e.g., A. Goldman, Justice and Reverse Discrimination 53 (1979) to be an effective incentive for eliminating discrimination in employer hiring decisions. He points out that the profit incentive to hire the most qualified does not hold because, among other things, (1) for many simple jobs, persons with different qualifications can nevertheless be expected to achieve approximately equal productivity, (2) many regulated industries are not affected by a profit motive, and (3) the bureaucracies of large business enterprises, quite simply, often make mistakes which are inconsistent with their own profit motivations. Fiss, "A Theory of Fair Employment Laws," 38 Chi. L. Rev. 235, 249 ff. (1971).

44 See, e.g., W. Ryan, Equality 27 (1981). Bruce Ackerman, in Social Justice in the Liberal State (1980), provides

an intriguing, analytically rigorous liberal theory which would assure scrupulously fair equal opportunities for all citizens. However, as Ackerman himself notes, his model is based on ideal theory, which must be replaced by "second best" or "third best" theory when grappling with real world problems.

[45] J.S. Mill, *On Liberty*, 217 (Everyman ed. 1951).

[46] *See* C. Jencks, *et al*., *Inequality: A Reassessment of the Effect of Family and Schooling in America* (1972). *See also* *The Inequality Controversy* (D. Levine and M. Bane, eds. 1975); *On Equality of Educational Opportunity* (F. Mosteller and D. Moynihan, eds. 1972); Miller, *supra* n. 14, ch. 10; J. Coleman, *et al*, *Equality of Educational Opportunity* (1966) (variations in school facilities and curriculums have little impact on pupil achievement, but the background of other students in that school strongly influences pupil achievement.) Coleman also argues elsewhere that if one concentrates on certain specific inputs (such as teacher verbal skills) it can be shown that education can have substantial results in raising attainment levels, although, realistically, equal educational opportunity can never be expected to fully compensate for all family and background deficiencies. J.S. Coleman, "Inequality, Sociology and Moral Philosophy," 80 J. Soc. 739 (1974). *Cf*. S. Bowles and H. Gintis, *Schooling in Capitalist America* (1976), arguing that schools, if not controlled by a capitalist ruling class, could make a difference.

[47] Consider, for example, the following example recounted by Richard de Lone, in *Small Futures: Children, Inequality and the Limits of Liberal Reform* 3-4 (1979). Jimmy and Bobby are both second graders in schools in the same town. Both enjoy school, are attentive in class, read slightly above grade level and have better than average I.Q.s. Bobby, however, is four times as likely as Jimmy to enter college and twelve times as likely to complete it. Bobby is also 27 times as likely as Jimmy to land a job, which by his late 40's, will pay him an income in the top tenth of all incomes in the country. The statistical differences between the life chances of these two boys result from the fact that Bobby is the son of a successful lawyer earning $35,000 per year, while Jimmy's father, who did not complete high school, works from time to time as a messenger and earns under $5,000 per year. *See also* Shostak, *et al*, *supra* n. 15, at 21 ("...the son of an elite father...has sixteen times the change of the semiskilled worker's son [to become elite himself]").

Of course, compensating one individual may require a shifting of benefits or resources away from another and the equities involved in such a process are often far from clear. For an interesting discussion of this point, carried to far-reaching conclusions, *see* R. Nozick, *supra* n. 22, at 235.

[48] *See* Jencks, *et al*, *supra* n. 46; de Lone, *supra* n. 47; K. Keniston, *All Our Children* (1977).

[49] *See* Ackerman, *supra* n. 44, ch. 7.

[50] *See* Bane, "Economic Justice: Controversies and Policies," in *The "Inequality" Controversy*, *supra* n. 46, at 277, 296; Rawls, *A Theory of Justice* 74 (1971).

"One might speculate about how far this movement of thought might go. The most conservative user of the notion of inequality of opportunity is, if sincere, prepared to abstract the individual from some effects of his environment. We have seen that there is good reason to press this further, and to allow that the individuals whose opportunities are to be equal should be abstracted from more features of social and family background. Where should this stop? Should it even stop at the boundaries of heredity? Suppose it were discovered that when all curable environmental disadvantages had been dealt with, there was a residual genetic difference in brain constitution, for instance, which was correlated with differences in desired types of ability; but that the brain constitution could in fact be changed by an operation. Suppose further that the wealthier classes could afford such an operation for their children. . . would we then think that poorer children did not have equality of opportunity because they had no opportunity to get rid of their genetic disadvantages." Williams, "The Idea of Equality," in H. Bedau, Justice and Equality 135 (1971).

[51] *Id*. *See also* O'Neill, "How Do We Know When Opportunities Are Equal," in M. Vetterling-Braggin, *et*. *al*., *Feminism and Philosophy* 177, 185 (1977).

[52] "The issue of equality of opportunity separates liberals and democrats not because they do not share the same ideal, but because they often disagree on how to achieve it." G. Sartori *supra* n. 22, at 336.

[53] They would, however, probably maintain with Rousseau that civil society creates social inequalities which aggravate the natural inequalities. *See* J.J. Rousseau, *The Discourse on the Origin of Inequality* 209 (Crocker, ed. 1967).

[54] "...redistribution would spur creativity among those now poor. There are, we may be sure, as many creative people in that population as in many others, and if they no longer had to worry continually about surviving, they too would be able to act on their need to create." Gans, "How Equal, Equal How?," The Columbia Forum 36, 38 (Spring 1975). See also, e.g., M. Bookchin, Post-Scarcity Anarchism (1971); All We Are Saying...: The Philosophy of the New Left (A. Lothstein, ed., 1970); H. Marcuse, Eros and Civilization (1955); C. Reich, The Greening of America (1970); Chomsky, "Language Development, Human Intelligence and Social Organization" in Equality and Social Policy 163, 171-175 (W. Feinberg, ed. 1978)

[55] J. tenBroek, supra n. 27, at 19. See also Walzer, "Dirty Work Should be Shared," Harpers, Dec., 1982, p. 22. In any event, the "aim of political egalitarianism is a society free from domination...It is not a hope for the elimination of differences."

[56] J. Rawls, A Theory of Justice 12 (1971)

[57] Id. at 100-101. Critics of Rawls have questioned his assumptions concerning the choices rational mean would make under the "veil of ignorance." Much of this criticism is discussed in terms of the "max-min" concept. It is not clear, argue the critics, that in the original position a rational man would necessarily seek to maximize his ability to avoid a life of total misery once the veil was removed; he might well be willing to take some prudent risks (such as assuming that he will not be among the most wretched in actual life) and therefore advocate a society which allows modest levels of differentials to maximize individual potential. On these points, see, e.g., Gauthier, "Justice and Natural Endowment: Toward a Critique of Rawls' Ideological Framework," 3 Soc. Theory & Prac. 3 (1974) and Sterba, "Justice as Desert" in 3 Soc. Theory & Prac. 101 (1974); B. Barry, The Liberal Theory of Justice (1973). J. Fishkin, Tyranny and Legitimacy, Ch. 13 (1979). Rawls' max-min concept, of course, gains much of its strength from the utilitarian concept of diminishing marginal utility: taking a good from one who has much and giving it to one who has very little would markedly increase over-all social utility. See Hare, "Justice and Equality" in Justice and Economic Distribution 116, 124-25 (J. Arthur and W. Shaw, eds. 1978). However, Prof. Michelman notes in this regard that "Satisfying a highly disadvantaged person's basic needs will sometimes be possible only at exceedingly large cost; and a com-

mitment to pay such costs whenever required will apparently force an unacceptable lowering of the minimum assurances which can be extended to the disadvantaged generally. The moral intuition at work here evokes a hybrid of maximin and average utility: it calls for something like the highest attainable level of average provisions for the group of the disadvantaged." Michelman, "Constitutional Welfare Rights and 'A Theory of Justice'" in N. Daniels, *Reading Rawls* 319, 333 (1974).

[58] *Id*. at 101-102. *See also*, Nagel, "Equal Treatment and Compensatory Discrimination," 2 Phil. & Pub. Aff. 348 (Summer, 1973).

[59] Rawls' concepts also lead back to the "equality of esteem" notions at the core of the original American egalitarian ideal: "Rawls has strengthened philosophical bases of that passion for equality which Toqueville saw as the deepest desire of the modern age." J. Schaar, "Reflections on Rawls' Theory of Justice," 3 Soc. Theory & Prac. 75 (1974). *See also* J. Pole, *supra* n. 1, at 335; *Comp*. N. Glazer, *supra* n. 38, at 4, 204.

[60] *See*, *e.g.*, H. Gans, *More Equality* (1968); Ryan, *supra*, n. 44.

[61] See, H. Arendt, *The Human Condition* (1958) for a profound counterargument alleging a fundamental incompatibility between the development and expression of individualistic, humanistic values and mass, egalitarian institutions. Comp: P. Bachrach, *The Theory of Democratic Elitism* (1980).

[62] Robert Nisbet postulates that the achievement of an egalitarian political order inevitably is associated with the rise of militaristic political systems and the demise of intermediate associations which are the bedrocks of any meaningful concepts of liberty. R. Nisbet, *Twilight of Authority* (1975). *See also* Isaiah Berlin's famous discussion of the dangers of "positive liberty" in "Two Concepts of Liberty," in I. Berlin, *Four Essays on Liberty* 118 (1969) and F.A. Hayek, *Law, Legislation and Liberty* 83 (1976). For a counter argument claiming that centralization (at least within the context of the American federal system) promotes both equality and liberty, *see* Patterson, "Inequality, Freedom, and the Equal Opportunity Doctrine," in *Equality and Social Policy* 15, 32 (W. Feinberg, ed., 1978).

[63] Rawls, *supra* n. 56, at 244.

[64] Indeed, it is for such reasons that Rawls' theory itself has been called "collectivist". *See* Coleman, "Inequality, Sociology, and Moral Philosophy" 80 Am. J. Soc. 739, 755 (1974). Moreover, as some leftist commentators have noted, if Rawls seriously intends for the liberty values of his first principle to be enjoyed by the mass of the population, priority, in fact, will have to be given to the second principle, *i.e.*, to ensuring a basic degree of economic equality and equality of esteem because these are essential pre-requisites for the meaningful pursuit of political and civil liberties. *See* Nielsen, "Radical Egalitarian Justice: Justice as Equality," 5 Soc. Theory & Prac. 209 (1979); Held, "Men, Women and Equal Liberty" in *Equality & Social Policy*, *supra* n. 62, at 66.

Gutmann, *supra*, n. 36 at 126, states that certain minimal needs, such as medical services, must be guaranteed to all in order for liberty to be meaningfully assured. Combining rights to provision of minimum services with rights of political participation, she believes, would provide a workable reconciliation of liberty and equality. This tenous balance is appealing in theory; the conservative critics cited *supra* n. 62, however, would claim that in practice, the scale would be weighted toward overbearing governmental interference with individual liberties.

[65] *See* R. Wolff, *Understanding Rawls* (1977). See also, Fried, "The Artificial Reason of the Lawyer: What Lawyers Know", 60 Tex. L. Rev. 35, 50 (1981). John Schaar has stated that in this sense Rawls is more radical than Marx since he emphasizes each person's needs but not that each person must contribute to society according to his ability. Schaar, "Reflections on Rawls' Theory of Justice," 3 Soc. Theory & Prac. 75, 89 (1974). In traditional Marxist thought, of course, the communist stage of distribution according to need was expected to occur only in the wealthy, industrialist societies, which had already borne the fruits of bourgeois enterprise. Similarly, much of the radical egalitarian literature which emerged with the counterculture movement in the 1960's was based upon assumptions of widespread economic affluence achieved by technology and advanced industrial enterprise. *See* works cited *supra*, n. 54. *See also*, J.K. Galbraith, *The Affluent Society* (1958).

[66] *See* p. 28 *supra* and accompanying notes.

[67] *See*, *e.g.*, D. Meadows, *et al*, *The Limits to Growth* (1972); W. Ophuls, *Ecology and the Politics of Scarcity*

because the relative functional importance of particular positions is merely assumed by the status quo. Stratification may, in fact, limit the development of talent. Tumin, "Some Principles of Stratification: A Critical Analysis," 18 Am. Soc. Rev. 387 (1953). See also O. Patterson, supra n. 63, at 17. In response to this criticism, Davis and Moore modified their original thesis and admitted that although the prestige of a position is tied to talent requirements, any particular individual actually holding such a position may not, in fact, measure up to its needs. Davis, "Reply to Tumin," 18 Am. Soc. Rev. 394 (1953).

71 W. Wesotowski, "Some Notes on the Functional Theory of Stratification", in Bendix and Lipset, Class Status and Power (1966), at 64, 69; see also A. Lindbeck, The Political Economy of the New Left 32 ff. (1971).

72 Ralf Dahrendorf carries this notion one step further by arguing that society must be hierarchical because its raison d'etre is to establish certain norms by which relationships among individual citizens would be ordered. Inevitably, the selection of values for these norms must involve discrimination against those individuals who tend not to conform with these values.

> "The origin of inequality is thus to be found in the existence in all human societies of norms of behavior to which sanctions are attached...there is inequality because there is law."

Dahrendorf, "On the Origin of Social Equality," in P. Laslett and W.G. Runciman, Philosophy, Politics and Sociology 88, 102 (1962). See also R. Dahrendorf, Life Chances ch. 6 (1979). For an ambitious effort to provide an empirically based synthesis of functionalist and radical egalitarian perspectives on these issues, see G. Lenski, Power and Privilege (1966). Applying a detailed model of egalitarian hypotheses to the experiences of a broad range of actual societies, Lenski concludes that inequality is inevitable in human society, although the degree of inequality is highly variable. Among other things, he postulates that with technological advance increasing proportions of goods and services will be distributed on the basis of power. See also, Walzer, supra, n. 55 for a discussion of a number of innovative insights on how "dirty work" might better be shared.

73 Ironically, although civil society may inevitably create inequalities which are problematic for a radical perspective, its existence seems to be a sine qua non

(1977); G. Myrdal, *Against the Stream* (1972); *cf.* P. Passell and L. Ross, *The Retreat from Riches* (1971); W. Beckerman, *Two Cheers for the Affluent Society* (1974), R. Barnet, *The Lean Years* (1980).

68 It has, of course, been argued by Marxists and others (*see* K. Marx, *The Economic and Philosophical Manuscripts of 1844* (Struik, ed. 1964); S. Avineri, *The Social and Political Thought of Karl Marx* 80 (1968); S. Lebergott, *supra*, n. 13) that the continued perception of economic scarcity in the midst of an affluent society results from creation of artificial demands which could be eliminated in a "rational" society. But even assuming that this is true, radical egalitarians must also confront the problems of "positional scarcity". Egalitarian strivings in a democratic society, to a large extent, represent attempts by those in the lower classes to obtain the lifestyle advantages which historically were enjoyed only by the upper classes. However, this pursuit often proves quixotic because many of these advantages, by their very nature, cannot be shared among a mass population. *See* F. Hirsch, *Social Limits to Growth* (1976) for an interesting discussion of how the dream of the upwardly mobile to enjoy such attributes of the upper classes as suburban estates or European travel becomes embittered when the tranquil suburban setting becomes transformed, by the very influx of numbers, into a congested, polluted form of urban sprawl; and the joyous European holiday becomes a pressured rush through crowded jet charters sterile chain hotels.

69 This perspective was especially emphasized during the counter culture movement of the late 60's. See works cited, *supra* , n. 54., cf. Walzer, n. 55, *supra*. For theories applying this anti-authority perspective to the educational context, see, *e.g.*, G. Leonard, *Education and Ecstasy*, (1968), A.S. Neill, *Summerhill: A Radical Approach to Child Rearing* (1959), J. Holt, *How Children Fail* (1964), I. Illich, *Deschooling Society* (1970).

70 The prime original statement of this point of view was contained in a 1945 article by Davis and Moore. Davis and Moore, "Some Principles of Stratification," 10 Am. Soc. Rev. 242 (1945). They claimed that universal needs for social survival required and inevitably led to a distribution of citizens into differential social positions. Generally, they stated, the highest ranked positions were those which are most important to the society and require the greatest training or talent. This thesis was subjected to strong criticism. For example, Tumin argued that the concept of the "most important position" in the Davis-Moore thesis is a tautology

for any meaningful potential for equality. *Cf*. J. Rousseau, *The Social Contract* (1762). An interesting additional perspective on this point is provided by Robert Tucker in *The Inequality of Nations* (1977). Despite much rhetoric for equality in international affairs, Tucker demonstrates that in the absence of an international order comparable to that imposed by civil society domestically, rights inevitably depend on might, and meaningful equality becomes unobtainable.

[74] Lakoff, *supra* n. 32, at 158.

CHAPTER THREE

EQUALITY AND THE COURTS

Because "American society [tends to reduce] its most troubling controversies to...a lawsuit"[1], the major controversies involving the conflicting egalitarian perspectives described in the preceding chapter have been brought before the courts in recent years. Indeed, it has been generally acknowledged that the modern civil rights era began with the Supreme Court's landmark school desegregation decision in Brown v. Board of Education.[2]

Since Brown, the courts have, of course, delved deeply into major egalitarian issues on the cutting edge of social controversy. The culmination of this era of intense judicial concentration on egalitarian issues was marked by Regents of the University of California v. Bakke,[3] the medical school preferential admissions case in which 58 *amicus* briefs, the most ever submitted in any Supreme Court case, presented virtually every conceivable legal -- and philosophical[4] --argument on equality to the Court.

Brown and Bakke, therefore, provide logical focal points for the discussion in this chapter on the interplay of equality of opportunity and equality of result themes in contemporary equal protection cases.* As we shall see, the courts' failure to establish a clear standard or consistent principles[5] on these issues seriously affected OCR's implementation of egalitarian precepts in the New York case study.

I. School Desegregation

The Supreme Court's decision in Brown was, primarily, a strong affirmation of the equality of opportunity credo. Technically, it was a reversal and renunciation of, the "formal equality" holding of the 1896 decision in Plessy v. Ferguson[6] where the Court had decreed that so long as blacks were given access to "equal" school resources, segregated facilities would satisfy constitutional precepts. Emphasizing that "[T]oday, education is perhaps the most

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*Based upon the discussion in the preceding chapters, the concepts of "equality of opportunity" and "equality of result" which will be utilized in this and succeeding chapters can be summarized as follows:

Equality of Opportunity: An emphasis (within the total American egalitarian ideology) upon individual effort and accomplishment which contemplates removal of particular discriminatory barriers so that individuals can advance in accordance with their actual present abilities.

Equality of Result: An emphasis (within the total American egalitarian ideology) upon overcoming societally caused economic or social disadvantages by eliminating the effects of past discrimination through structural reforms, including, at times, the provision of immediate access to certain fundamental social, educational or economic benefits important function of state and local governments,[7] the Court in Brown probed beyond the form of "separate but equal" physical facilities and looked to the substance of educational opportunities being made available to black students. Building on a series of prior decisions which had shown that in specific instances "equalizing" physical facilities did not provide true equal educational opportunity,[8] the Court held that separate education necessarily generates "a feeling of inferiority" in the hearts and minds of black students and concluded with the ringing statement that "separate educational facilities are inherently unequal."[9]

In short, the Court's main concern in Brown was to guarantee full, fair opportunity[10] which would allow black students to develop their natural talents and abilities. But imbedded beneath the surface of this strong articulation of the classical liberal credo were the seeds of a result-oriented approach to educational equality. Indeed, the Brown decision exemplified the close interplay between the two concepts. For in order to assure full, effective "opportunity" for black students, the Court saw that it could not merely analyze the specific resources which had been, or could have been, provided in separate black schools; instead, it concluded that at a certain point it

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to the formerly disadvantaged.

becomes counter-productive to focus on the fairness of resource inputs on the precise causes of differential achievement and it becomes necessary to look for solutions by insisting on actual results. Thus, integral to the Court's approach in Brown was a result-oriented view that the Court must look not at questions of equalizing resources, but "instead to the effect of segregation itself on public education."[11]

The significant equality of result implications of Brown slowly began to emerge as its desegregation mandate began to be implemented. In the early years, some of the lower courts adopted a narrow equality of opportunity perspective. They maintained that all the Supreme Court had required is for the state to open its schools to children of all races, and "if the schools which [the state] maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches."[12] Because few black students were motivated to face the hostility and community pressures attendant upon enrollment in white schools only token integration occurred under this standard during the first decade following Brown.[13]

However, as it became increasingly clear that a standard of voluntary access to educational opportunity was not achieving meaningful desegregation in most southern schools systems, the Supreme Court finally moved in a "result-oriented" direction to assure that the intent of *Brown* would be effectuated. Thus, in *Green* v. *County School Board*[14], when statistics showed that despite three years of operation under a "freedom of choice" plan, no white had gone to a black school and 85% of the blacks still attended the black school, the Court held that freedom of choice was "unacceptable." Rather than analyzing the specific impediments to fair opportunity which existed under the freedom of choice plan (such as poverty, psychological reservations, attitudinal pressures and social inertia), the Court's unanimous opinion emphasized results and required the school board to develop "a plan that promises realistically to work and promises realistically to work *now*."[15]

This emphasis on affirmative action to achieve results was again emphasized in the Court's next major desegregation pronouncement, *Swann* v. *Charlotte - Mecklenberg Board of Education*.[16] There, the Court upheld the District Court's imposition of numerical guidelines (here 71% white, 29% black) for judging the effectiveness of integration in each school in the district. Of equal precedential significance was the Court's affirmance of the use of "bus transportation as one tool of school desegregation,"[17] despite strong arguments that busing and redistricting away from the neighborhood school interfered with the "freedom of choice" and opportunities of white students.

The Supreme Court's strong emphasis in Green - Swann on "results that work now" seemed at the time to presage elimination of the traditional de jure - de facto distinction in segregation cases. Commentators had long noted[18] that the logic of Brown's holding that separate schools were inherently unequal would call for remedying all segregated schooling patterns, whether these had originated because of "purposeful" state laws and actions ("de jure segregation") or because of "natural" housing trends and other such developments which could not be directly attributable to any purposeful state laws or actions ("de facto segregation").

Some cases considering segregation patterns in the North in the early years held that proof of de facto segregation was sufficient to establish a constitutional violation.[19] The Supreme Court's holding in its first major desegregation case outside the deep South, Keyes v. Board of Education[20] did not accept such a standard, but it did hold that school systems which had not operated under statutory segregation mandates nevertheless would be held accountable for segregated schooling patterns if they had taken actions in the past (such as zoning and school site selection) which contributed to segregation. The Court further held that a finding of de jure segregative acts in a substantial portion of the Denver school system would justify mandating effective remedies to eliminate segregation throughout the entire system, in the absence of counterveiling proof of non-segregative intent system-wide by the school board.

A year later, in Milliken v. Bradley,[21] the Supreme Court dramatically shifted direction away from its previous result-oriented approach. There, the Court refused to uphold the concept of inter-district remedies and precluded the District Court Judge from including 53 suburban school districts in an ambitious cross-busing scheme to desegregate the Detroit school system. Although the facts strongly indicated that effective desegregation of the predominantly black urban school system would require integration with the suburbs,[22] Chief Justice Burger's opinion for a close 5-4 majority held that achievement of such a result would not warrant offsetting other important values such as local control of education and avoidance of over-bearing judicial involvement in school operations. Reflecting a strong equality of opportunity perspective, the decision emphasized the lack of any findings of intentional segregation by the suburban school districts, rather than the need to include these districts in a busing plan if any meaningful desegregation were to be accomplished.

Consistent with the movement away from a result orientation in Milliken has been the Supreme Court's emphasis in a related series of constitutional cases upon the necessity in constitutional equal protection cases of a finding of discriminatory intent by state officials, rather than a mere finding of discriminatory impact on affected minority populations.[23]

Under an "impact" standard, a plaintiff need only show that a disproportionate number of minorities are being denied the benefit at issue (jobs, schooling, voting, etc.); that "result" is enough to shift to the defendants a heavy burden of justification which is difficult to establish. Under the "intent" standard, however, it is not the result of the disputed policy which is dispositive, but rather, the frame of mind of those who adopted or implemented the policy and whether they actually sought to discriminate or restrict opportunities for minorities. The need to prove such a subjective state of mind (even if objective indicia of subjective views are permitted) is, obviously, a difficult task for any plaintiffs.

But, although current constitutional doctrine requires a finding of discriminatory intent, many Supreme Court decisions continue to reflect a result orientation by reading language in Congressional statutes (as contrasted to constitutional precepts) to hold defendents to an impact standard.[24] In its constitutional rulings, the Court, depending on particular circumstances, at times seems to emphasize equality of opportunity by calling for strong evidence of discriminatory intent,[25] while at other times seems to emphasize equality of result by accepting minimal indicia of intent.[26] Thus, the intent/impact distinction could almost be said to provide a barometer of the Supreme Court's position, in any given case, on the equality of opportunity-equality of result continuum.[27]

In short, then, in the decades since Brown, the law concerning school desegregation may be said to have oscillated from a strong equality of opportunity to a strong equality of result direction,[28] and then returned more (although not completely) toward the opportunity pole.[29] Overall, however, the Court's emphasis in the classical Southern desegregation cases on plans which "promise realistically to work now" gave important legitimacy to advocates of equality of result, a legitimacy which continued to add substance to the result perspective even after the Court had moderated its own stance.

II. Preferential Admissions

The fundamental conflict on egalitarian values which was reflected in the evolution of school desegregation law over the 25-year period following the Supreme Court's decision in Brown was put into more immediate and sharp focus in the late 1970's in the intense controversy that developed over affirmative action policies in university admissions.[30] In response to egalitarian pressures, many universities had established admissions procedures which either set aside a specific number of places in entering classes for members of minority groups or accepted minority applicants having grades and standardized test scores lower than those of white admittees.[31]

The resulting disputes between critics and defenders of these practices, reflecting the equality of opportunity and equality of result perspectives, were phased in terms of "justice" issues (contrasting notions of individual merit[32] with arguments for compensation for past and present discrimination[33]) and "social utility" issues (involving considerations of how the development of talent[34] and overall societal efficiency might best be promoted[35]).

The focal point of this controversy was Regents of the University of Caifornia v. Bakke[36] where the admissions system adopted at the University of California's medical school at the Davis campus was being challenged. Under the Davis Plan applicants from a number of specified minority groups who claimed to come from educationally or economically disadvantaged back-grounds, were permitted to have their applications reviewed by a special admissions committee. This committee would recommend candidates for 16 of the 100 places available in the entering class. The minority candidates recommended by the committee generally had substantially lower undergraduate grade point averages and test scores than those admitted under the regular admissions process. Alan Bakke, a white applicant who was denied admission, challenged the legality of this process, which he claimed precluded him from fairly competing for 16% of the available places in the entering class.[37]

The Supreme Court's treatment of this issue culminated in a lengthy, complex decision containing six separate concurring and dissenting opinions. Basically, four members of the Court, joining in an opinion by Justice Brennan, stated that the preferential admissions system should be held to meet constitutional requirements, while four other members, joining in an opinion by Justice Stevens, were of the opinion that Title VI of the 1964 Civil Rights Act precluded any type of race conscious admission system, and would not reach the constitutional question. The ninth member of the court, Justice Powell, who thus became the swing vote, held that the specific "quota" approach used at Davis was unconstitutional.

At the core of differing opinions and arguments set forth by the Justices in Bakke[38] was the basic controversy between equality of opportunity and equality of result perspectives. The four Justices in the Brennan group, on balance, reflected an equality of result perspective. They emphasized the fact that although blacks represent approximately 11.1% of the overall population, their proportion in the medical profession was approximately 2.2%; under normal procedures few blacks would be admitted to medical school, causing this disparity to continue indefinitely.[39] While recognizing the importance of the values of individual desert and individual opportunity in the American political and legal tradition,[40] the Brennan group gave great weight to the need to root out historical patterns of societal discrimination:

> "Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large. large. There is no question that Davis' program is valid under this test."[41]

Justice Powell's swing opinion gave greater weight to values of equality of opportunity and the need for color-blind equal treatment of all races.[42] He rejected the notion of imposing a result-orientated solution for broad patterns of societal discrimination, at least where no court or legislative body had found specific instances of discriminiation in the immediate situation.[43] Consistent with his equality of opportunity perspective, Justice Powell refused to accept the two "justice" arguments put forward by the University for its preferential admissions policy (increasing the traditionally low minority representation in medical schools and the medical profession, and countering the effects of past societal discrimination) as well as its major social utility argument (increasing the number of physicians who would practice in currently underserved minority communities). However, adopting what some have called a "Solomonic compromise,"[44] Justice Powell accepted the University's final social utility justification for preferential admissions,[45] the educational benefits of an ethnically diverse student body. This diversity rationale, set forth as an issue of academic freedom under the First Amendment, was held by Justice Powell to provide a "compelling" justification for a race conscious policy.

Under Justice Powell's approach, a university seeking to diversify its student body could give extra consideration, on an individual basis, to ethnic background, and in assessing the extent to which such consideration would be appropriate, the admissions committee apparently could also give "some attention to [total] numbers."[46] Thus, Justice Powell's compromise would probably allow a university admissions committee to implement an affirmative action program assuring precisely the same minority representation as did the one at Davis, but in a manner less likely to grate against majoritarian sentiments.[47]

In subsequent cases raising affirmative action issues similar to those in Bakke, the Supreme Court majority has again avoided frontally facing the basic equality issues[48] and has issued technical rulings which resolve the immediate controversy without providing consistent precedents on egalitarian principle issues.[49] Thus, in *United Steelworkers of America* v. *Weber*,[50] a procedure requiring that 50% of those selected for admission to an aluminum company's apprenticeship training program be minorities was upheld as being a "voluntary" action of a private company which did not violate Title VII of the 1964 Civil Rights Act and did not require consideration of Constitutional issues. Similarly, the requirement that 10% of federal funds for local public works projects must be set aside for minority contractors at issue in *Fullilove* v. *Klutznick*,[51] was upheld primarily on the grounds that Congressional findings of past discrimination in the construction industry justified a remedial approach of this type. The basic constitutional issues and the equality of opportunity/equality of result problems related to them, although discussed at length in the concurring and dissenting opinions,[52] were not reached by the main decision of the court. The majority further indicated that henceforth the Court would leave to Congress and the executive agencies the difficult problems of attempting to articulate basic principles or policies on egalitarian issues.[53]

In light of this deferential attitude, the approaches toward equality issues taken by the other branches of government take on added significance. Accordingly, in the next chapter we will turn our attention to Congress' consideration of equality issues, before commencing our detailed case study of the executive branch's (OCR's) involvement.

1 R. Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* x (1976).

2 347 U.S. 483 (1954).

3 438 U.S. 265 (1978).

4 Note, for example, the lengthy discussion of Rawls' *Theory of Justice* at the beginning of the brief submitted by the American Civil Liberties Union.

5 Although there is, of course, much controversy on the extent to which courts should engage in social policy-making activities, the courts are generally acknowledged to be the institution best constituted for *principled* decision-making (*See, e.g.*, Wechsler, "Toward Neutral Principles of Constitutional Law" 73 Harv. L. Rev. 1 (1959); R. Dworkin, *Taking Rights Seriously*, Ch. 4 (1977); A Bickel, *The Least Dangerous Branch* (1962). The "rational-analytic mode of judicial decision making is considered at length in M. Rebell and A. Block, *Educational Policy Making and the Courts* (1982).

6 163 U.S. 537 (1896).

7 347 U.S. at 493.

8 *See, e.g.*, *Missouri ex. rel. Gaines* v. *Canada*, 305 U.S. 337 (1938) (payment of tuition at out-of-state law school did not provide equal opportunity); *Sweatt* v. *Painter*, 339 U.S. 629 (1950) (separate in-state black law school did not provide adequate faculty, variety of courses, and opportunity for specialization); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950) (separate "ghetto" bench in graduate school facility impaired black plaintiff's ability to learn).

9 347 U.S. at 495.

10 The specific phrase "equal educational opportunity" was repeated at least half a dozen times in the course of the Court's opinion.

11 347 U.S. at 492 (emphasis added). James Coleman discussed the Brown decision in somewhat similar terms:

> "In a decision of the Supreme Court, this unarticulated feeling began to take more precise form. The essence of it was that the *effects* of such separate schools were, or were *likely* to be, different. Thus, a concept of equality of opportunity which focused on *effects* of schooling began to take form. The actual decision of the court was in fact a confusion of two unrelated premises: this new concept, which looked at results of schooling, and the legal premise that the use of race as a basis for school assignment violates fundamental freedoms. But what is important for the evolution of the concept of equality of opportunity is that a new and different assumption was introduced, the assumption that equality of opportunity depends in some fashion on effects of schooling." Coleman, "The Concept of Equality of Educational Opportunity," 38 Harv. Educ. Rev. 7, 14 (1968).

See also, D. Kirp, *Just Schools: The Idea of Racial Equality in American Education*, 41 (1982).

12 *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955). Indeed, early decisions of the Supreme Court also hinted that open admissions was the full extent of the constitutional mandate. *See*, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 7 (1958); *Goss* v. *Board of Education*, 373 U.S. 683 (1963); *Griffin* v. *County School Board*, 377 U.S. 218 (1964).

13 In the 1963-64 school year, in the eleven Southern states, only 1.17% of black children attended school with white children. By the 1965-66 school year, this had risen to 6.01%, largely as a result of the passage of the 1964 Civil Rights Act; however, Alabama, Louisiana, and Mississippi each had less than 1% of their black children in school with whites. In the same year, for the 17 Southern and border states, 10.9% of black children attended school with white children. *U.S.* v. *Jefferson County Board of Education*, 372 F.2d 836, 854 (5th Cir. 1966).

State legislatures enacted a variety of statutory schemes designed to obstruct the desegregation process. Among these were tuition grants to enable children to attend private schools, *see* *Griffin* v. *County School Board*, 377 U.S. 218 (1964); closing of the public schools, *see* *James* v. *Almond*, 170 F. Supp. 331 (E.D.Va.), *appeal dismissed*, 359 U.S. 1006 (1959); freedom of choice plans, *see* *Green* v. *County School Board*, 391 U.S. 430 (1968). A major device utilized in connection with the early freedom of choice plans were State Pupil Placement Boards, which automatically re-assigned children to the school they had been attending unless the student requested a transfer. Blacks seeking to transfer had to satisfy strict criteria, including achievement levels well above the median of the class into which they sought to transfer. *See* *Green* v. *School Board*, 304 F.2d 118 (4th Civ. 1962), *Shuttlesworth* v. *Birmingham Board of Education*, 358 U.S. 101 (1958); Johnson, "School Desegregation Problems in the South: An Historical Perspective" 54 Minn. L. Rev. 1157 (1970).

[14] 391 U.S. 430 (1968).

[15] 391 U.S. at 439.

[16] 402 U.S. 1 (1971). *See* *also* Fiss, The Charlotte-Mecklenberg Case -- Its Significance for Northern School Desegregation, 38 U. Chi. L. Rev. 697, 704 (1971) ("The net effect of Charlotte-Mecklenberg is to move school desegregation doctrine further along the continuum toward a result-oriented approach.")

[17] 402 U.S. at 30.

[18] *See*, *e.g.*, Dimond, "School Segregation in the North: There is But One Constitution" 7 Harv. C.R. - C.L.L. Rev. 1 (1972). Justices Powell and Douglas advocated abandonment of the *de jure* - *de facto* distinction in their concurring opinions in *Keyes*, *infra*, n. 20, at 214 and 217.

[19] *See*, *e.g.*, *Oliver* v. *School District of Kalamazoo*, 346 F. Supp. 766 (W.D. Mich. 1972), *aff'd*, 448 F.2d 635 (6th Cir. 1972); *Jackson* v. *Pasadena City School District*, 382 P. 2d 878, 882 (1963) (Sup. Ct. Cal. 1963); *Johnson* v. *San Francisco Unified School District*, 339 F. Supp. 1315 (N.D. Cal. 1971); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970).

20 413 U.S. 189 (1973). From the perspective of egalitarian theory, acceptance of strict *de facto* segregation positions would be tantamount to acceptance of an equality of condition approach. The Courts insistence in *Keyes* and later cases (see n. 26 *infra*) on at least a scintilla of discriminatory purpose or discriminatory intent illustrates the fundamental point that even strong assertions of the equality of result position in America ultimately are tied to a concept of opening opportunities, rather than of re-distributing benefits.

21 418 U.S. 717 (1974).

22 In 1970, the Detroit public school system's student body was 64% black, while the metropolitan area as a whole was 81% white. The District Court had noted that the best Detroit only remedy would "leave many of its schools 75 to 90 percent black." 418 U.S. at 765.

23 *See* *Washington* v. *Davis*, 426 U.S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Cf.* *Personnel Administration of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979); *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *Memphis* v. *Greene*, 451 U.S. 100, 129 (White, J., concurring); *see also* "Note, Reading The Mind of the School Board: Segregative Intent and the *De Facto*/*De Jure* Distinction," 86 Yale L.J. 317 (1976).

24 *See*, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Board of Education of the City School District of New York* v. *Harris*, 444 U.S. 130 (1979). Note also the continued result orientation (limited, of course, to an intra-district basis) in cases upholding strong remedial action such as the extensive compensatory education ordered in *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*). Note also that in some later cases (*Hills* v. *Gautreaux*, 425 U.S. 284 (1976); (*Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del, 1975), *aff'd* 423 U.S. 963 (1975), the Court has indicated that where some indicia of inter-district liability is present, metropolitan desegregation remedies will be ordered.

25 *See*, *e.g.*, *Dayton Board of Education* v. *Brinckman*, 433 U.S. 406 (1977).

26 *See*, *e.g.*, *Dayton Board of Education* v. *Brinckman*, 443 U.S. 526 (1979); *Columbus Board of Education* v. *Penick*, 443 U.S. 449 (1979). The essential holding in these cases was that if a school district anywhere in the country was operating on a dual basis at the time of the *Brown* decision in 1954, it had an affirmative duty to take steps to eliminate vestiges of the dual system or to at least show that current racial patterns do not reflect the impact of the pre-1954 policies; in this regard, "the measure of post-*Brown I* conduct...is effectiveness, not...purpose..." (White, J., 443 U.S. at 538.) Justice Rehnquist, in a strong dissent, stated that this approach of basing present liability on actions in the "remote past" effectively eliminates the *de jure* - *de facto* distinction. (443 U.S. at 542). *See also* *Washington* v. *Seattle School District No. 1*, ___ U.S. ___ (1982), 50 U.S.L.W. 4998 (intent standard not applied to statewide initiative to prohibit mandatory busing; initiative invalidated for placing "special burdens on minorities".) *But cf.* *Crawford* v. *Board of Education of the City of Los Angeles*, ___ U.S. ___ (1982), 50 U.S.L.W. 5016 (proposition precluding state courts from ordering busing except in acordance with federal fourteenth amendment standards upheld.)

27 The concepts of discriminatory intent and discriminatory impact are, of course, highly interrelated, like the concepts of equality of opportunity and equality of result, to which they may be analogized; thus, the court has specifically held that a clear indication of detrimental impact upon a minority population constitutes one important factor to be considered in assessing whether discriminatory intent was at play, *see* *Arlington*, 429 U.S. at 266, a factor which standing alone at times can be fully determinative, *Castaneda* v. *Partida*, 430 U.S. 482 (1977).

28 Similar doctrinal oscillations between equality of opportunity and equality of result perspectives have occurred in other areas of equal protection law during the Burger Court era, as, for example, welfare rights (*Comp.* *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) with *Dandridge* v. *Williams*, 397 U.S. 471 (1970) and *U.S. Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973)) and in access to the

courts (Comp. Griffin v. Illinois, 351 U.S. 12 (1956) with Boddie v. Connecticut, 401 U.S. 371 (1971) and Ross v. Moffitt, 417 U.S. 600 (1974)).

29 For general overviews of the development of desegregation law see G. Orfield, Must We Bus? (1978); J. Wilkinson, From Brown to Bakke (1979), Kirp, supra, n. 11. See also, Yudof, "School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, 42 Contemp. Probs. 57, 58 (Autumn 1978).

30 "For Bakke posed the arch conflict between equality and meritocracy...Brown had not involved any such conflict. Segregated schools were not only separate and unequal; they were also unmeritocratic ...In Brown, for a fleeting moment, equality and meritocracy seemed one...[but] soon this uneasy truce began to fray." J. Wilkinson, supra n. 29, at 264.

31 For example, for medical schools in the mid-1970"s the average score of black acceptees on the Medical College Admissions Test science section was 127 points lower than that of white acceptees and 80 points lower than that of white applicants. A. Sindler, Bakke, DeFunis and Minority Admissions: The Quest for Equal Opportunity 111 (1978).

32 Adherents of equality of opportunity argue that only the credentials of each individual applicant based on objective test scores, should be considered. They emphasize that "our most basic ideal that individual merit and individual need should be the only relevant considerations for societally distributed rewards and benefits." Graglia, "Special Admission of the Culturally Deprived to Law School," 119 U. Pa. L. Rev. 351, 352 (1970). See also A. Goldman, Justice and Reverse Discrimination (1979); N. Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy (1975); B. Gross, Reverse Discrimination (1977), Lavinsky, "DeFunis v. Odegard, The Non-Decision With a Message," 75 Colum. L. Rev. 520 (1975): Sowell, "The Plight of Black Students in the United States," Daedalus 179 (Spring, 1974).

Goldman points out that preferential hiring practices often compensate for discrimination suffered by older generations of women or blacks by giving preferential status to younger members of these groups who, in fact, have had full opportunities in a non-discriminatory environment to develop their potential. Glazer emphasizes that even benign racial classifications lead to a host of complex difficulties in classifying individuals according to their racial characteristics. Cf. Nickel, "Preferential Policies in Hiring and Admissions: A Jurisprudential Approach", 75 Colum. L. Rev. 534, 558 (1975) advocating a program permitting blacks, Chicanos, and "anyone else who thinks he is entitled" to apply for preference in admissions). Sowell contends that much of the problem in this area results from the phenomenon of "mismatching" in that minority students who are objectively qualified to be admitted to programs at a certain level, enter programs at a higher level, creating unneccessary problems for all concerned.

33 Proponents of preferential admissions argue that the assumption that overt discrimination against minority individuals can be identified and rectified has been shown to be inadequate in practice because many persistent, subtle patterns of discrimination have not been effectively eliminated by anti-discrimination laws and regulations. Therefore, race conscious admissions policies are not only justifiable, but are the only means of providing meaningful equality and opportunity. See, e.g., B. Bittker, The Case for Black Reparations (1973); Fiss, "Groups and the Equal Protection Clause," 5 Phil. And Pub. Aff. 107 (1976). Furthermore, it is claimed, preferential policies need not open the door for a reimposition of quotas and racial sterotyping because non-stigmatizing "benign" discriminatory policies adopted by a legislative majority "against itself", are not comparable to the invidiousness of discriminatory policies imposed on powerless minority groups. Ely, "The Constitutionality of Reverse Racial Discrimination", 41 U. Chi. L. Rev. 723 (1974). For a critique of Ely's position, see Sandalow, "Racial Preferences in Higher Education: Political Responsibility and the Judicial Role," 42 U. Chi. L. Rev. 653 (1975); Greenawalt, "Judicial Scrutiny of 'Benign' Racial Preference in Law School Admissions", 75 Colum. L. Rev. 559, 573 (1975).

Ronald Dworkin argues that the basic tenets of fair individualized treatment are met when there is "treatment as an equal," meaning that if the potential loss of a white applicant is seriously considered, his interests may ultimately be outweighed for broader policy reasons which will benefit the community as a whole. R. Dworkin, *Taking Rights Seriously* 223-239 (1977); *See also* the concept of "equal consideration of interests" discussed in S. Benn, "Egalitarianism and the Equal Consideration of Interests" in Pennock and Chapman, *Equality* (1967) at 61.

34 Opponents of preferential admissions argue that because opportunities such as higher education are limited, available places should be reserved for those who can make the most of them. They also believe that the objective tests used to measure "merit" for University admissions purposes, though not perfect, are probably more effective than any alternatives ever utilized. *See*, *e.g.*, J. Gardner, *Excellence: "Can We Be Equal and Excellent Too?"* 48 (1961).

Virtually all commentators on this subject tend to agree that high scores on scholastic aptitude tests, law school admissions tests, medical college aptitude tests, etc., correlate substantially with high performance in basic college and graduate school courses. *See*, *e.g.*, A. Sindler, *supra* n.31 at 115; O'Neil, "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," 80 Yale L. J. 699, 733 (1971); Greenawalt, *supra*, n. 33 at 586; A. Goldman, *supra* n. 32 at 59. Similarly, modern I.Q. tests have been shown to be a necessary, although not sufficient (because the interplay of additional factors such as motivation, perseverence, etc.) indicator of success in schooling at all levels. *See* R. Herrnstein, *I.Q. in the Meritocracy* 113 (1973).

Advocates of preferential admissions retort that although standardized tests measure reasonably well those attributes they measure, they do not even purport to deal with a wide range of the creative aspects of human thought. *See*, *e.g.*, A. Gartner, *et al.*, *The New Assault on Equality: I.Q. and Social Stratification* 4 (1974); Hudson, "The Limits of Human Intelligence", in J. Benthall, *The*

Limits of Human Nature 176 (1974). For a fascinating exploration of the disquieting implications of a pure "meritocratic" social policy, see M. Young, The Rise of the Meritocracy: 1870-2033 (1958). Furthermore, there has been no adequate showing that academic performance, as presently defined, is a fair indicator of ability to perform well in actual job situations. D. McClelland "Testing for Competence Rather than for Intelligence" in A. Gartner, supra, n. 34, at 168; Karst and Horowitz, "Affirmative Action and Equal Protection," 60 Va. L. Rev. 955, 969 (1974)' Bell, "In Defense of Minority Admissions Programs: A Response to Professor Graglia," 119 U. Pa. L. Rev. 364, 367 (1970).

35 Under present admissions criteria, only a relatively few individuals at the top of the admissions pool are outstandingly qualified and a relatively few at the bottom clearly unqualified. The broad middle range of candidates is usually acknowledged to be capable of performing adequate/competent work. Proponents of preferential admissions argue, therefore, that until such time as truly validated selection standards are devised, selection decisions among this broad middle range of applicants should be on a random basis, for reasons of basic fairness. Alternatively, if social policy is to be a consideration, preferential admissions are justified on the basis of broad notions of social utility which include, in addition to consideration of economic productivity, goals such as the promotion of racial integration (or stated another way, the elimination of racial tensions and confrontation) which are legitimate "macroproductivity" needs of society. See Daniels, "Merit and Meritocracy"

7 Phil. Pub. Aff. 206 (1978); Karst and Horowitz, supra n. 34, at 963. Note, of course, that pure academic "merit" has, in fact, never been the sole criterion for university admissions, since "social utility factors" such as promotion of alumni relations, geographic diversity, likely future career directions, etc. have always been considered. See Wasserstrom, "Racism, Sexism and Preferential Admissions: An Approach to the Topics 24 U.C.L.A. L. Rev. 581, 617 (1977).

36 438 U.S. 265 (1978). Similar issues had been involved in the controversy concerning preferential admissions practices at the University of Washington Law School in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). The Supreme Court managed to avoid squarely facing these highly charged issues in that case, however, by declaring the controversy moot in light of the fact that the plaintiff, who had been temporarily admitted pending his appeal, was about to graduate by the time the Supreme Court was called upon to issue a final decision.

37 Interestingly, Bakke had both a higher grade point average and higher Medical College Admissions Test (MCAT) scores than the average of those students admitted to the 84 regular places in the class; apparently, he was denied admission through the regular admission process because of his comparatively low rating on the interview aspects of the admissions process. 438 U.S. at 277, n. 7.

38 Setting aside for present purposes the complex, legal disputes concerning the applicable constitutional equal protection standards and the legislative intent behind Title VI (which will be considered in the next chapter).

39 438 U.S. at 370.

40 *See*, *e.g.*, discussion at 438 U.S. 360-61.

41 438 U.S. at 369. Justice Marshall, in a moving separate opinion, analyzed in detail the history of discrimination against blacks in the United States and emphasized that because of this unique history, all blacks were entitled to an immediate result-oriented preferential policy. His emphasis on the unique history of blacks in America was intended to answer the "no stopping point argument" and the claim that individual middle class blacks had not suffered discrimination. (*See* 438 U.S. at 400-401).

42 438 U.S. at 295.

43 The record in the case indicated that the University of California had adopted the preferential admissions policy voluntarily and there was no finding that in the past the university had discriminated in admissions. Some commentators have

indicated, however, that because of the unique setting of the *Bakke* case which was argued by a white plaintiff and a white-controlled university, minority group interests who may have been able to show that patterns of racial discrimination did exist at the University of California were not afforded a real opportunity to do so. *See* Bell, "Bakke, Minority Admissions and the Usual Price of Racial Remedies," 67 Cal. L. Rev. 3 (1979).

44 Blasi, "Bakke as Precedent: Does Mr. Justice Powell Have a Theory?" 67 Cal. L. Rev. 21 (1979). *See also* "The Supreme Court, 1977 Term," 92 Harv. L. Rev. 57, 135-37 (1978); Tribe, "Perspectives on Bakke: Equal Protection, Procedural Fairness or Structural Justice," 92 Harv. L. Rev. 864-5 (1978).

45 This argument had generally been viewed (from a social policy point of view) as the weakest of the university's justifications. *See* Greenawalt, "Unresolved Problems of Reverse Discrimination", 67 Cal. L. Rev. 87, 122 (1979).

46 438 U.S. at 323.

47 *See* "The Supreme Court, 1977 Term," 92 Harv. L. Rev. 57, 146 (1978); Blasi, *supra* at 65. For a detailed analysis of how an admissions program can be structured to meet the Bakke standards, *see* Lesnick, "What Does Bakke Require of Law Schools?, 128 U. Pa. L. Rev. 141 (1979); *see also Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893 (3d Cir. 1981) (unsuccessful white applicant denied standing to challenge law school admissions policies).

48 Note also that nowhere in the 156 pages of the lengthy *Bakke* decision is direct consideration given to the significant issue as to whether the standardized admissions procedures used at Davis were "validated" or reasonably related to the purposes for which they were being used. There was substantial evidence, submitted in *amicus* briefs and noted in prior lower court decisions, that although there is a correlation between scores on the Medical College Admissions Test and course grades in the first two years of medical school, the test was not validated either to grades in clinical cources during the latter years of medical school or to actual performance on the job after

graduation. *See*, *e.g.*, A. Sindler, *supra* n. 31 at 119; *Alevy* v. *Downstate Medical Center*, 39 N.Y. 2d 326, 330 (1976). *Cf.* Justice Douglas' dissenting opinion in *DeFunis*, 416 U.S. 327-30. Thus, the Court totally ignored the major questions concerning fairness of current testing procedures and the application of standards discussed *supra* at n. 34.

49 The lower courts have had difficulty in applying the complex *Bakke* holding to other cases (*See*, *e.g.*, *Uzzell* v. *Friday*, 591 F.2d 997 (4th Cir. 1979), 625 F.2d 1117 (4th Cir. 1980), *cert. denied*, 446 U.S. 951 (1980) (application of *Bakke* to race conscious student election cases); *Association Against Discrimination in Employment* v. *City of Bridgeport*, 594 F.2d 306 (2d Cir. 1979), 647 F.2d 224 (2d Cir. 1981) (issues concerning preferential hiring system for firefighters reconsidered in light of *Bakke* and other authorities), although there appears to be a tendency to read *Bakke* as generally permitting racially conscious affirmative action plans in a variety of circumstances. *See*, *e.g.*, *Detroit Police Officers Association* v. *Young*, 608 F.2d 671 (6th Cir. 1979); *cert. denied*, 452 U.S. 938 (1981) (reversal of invalidation by lower court of race conscious hiring system for police officers on the basis of *Bakke*); *Firefighters Institute* v. *City of St. Louis*, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979) (immediate promotion of all black firefighters ordered on basis of *Bakke* precedent); *Setser* v. *Novack Investment Co.*, 657 F.2d 962 (8th Cir. 1981) (race conscious affirmative action hiring plan upheld under 42 U.S.C. §1981).

50 443 U.S. 193 (1979).

51 448 U.S. 448 (1980).

52 Justice Powell's separate concurring opinion emphasized the need to justify the Court's actions in traditional equal protection terms; in this situation, he would find a "compelling governmental interest" in eradicating the continuing effects of past discrimination identified by Congress, 448 U.S. at 496-97. (In other words, given proper Congressional imprimatur, Justice Powell would accept an equality of result approach as being

constitutionally compelling). Justices Marshall, Brennan and Blackmun, in their concurring opinions argued for the middle ground "substantial relationship" approach to equal protection issues which they had articulated in *Bakke*, 448 U.S. 517-19; under this less rigorous Constitutional standard, they had little difficulty in upholding the result-oriented minority set-aside program. Justice Stevens' dissent applied traditional equality of opportunity arguments to the facts of the case, stating that any discrimination that may exist in the contracting area might justify legislation to improve bidding procedures or to provide access to financing sources for minority contractors, but it would not justify a preferential approach which gives benefits to a broad range of "minority" contractors including wealthy black businessmen and Eskimos and Orientals who may never have suffered any discrimination and may need no such assistance. 448 U.S. at 543-44.

53 The opinion of the Court, written by Chief Justice Burger and joined by Justices White and Powell, discussed in detail the history of Congress' acknowledgment of discrimination in the construction industry (although no direct hearings were held in connection with this bill) and analogized Congress' approach to that of the federal courts in fashioning remedies in desegregation cases. Thus, it might almost be said that the Court, which has in the past been criticized for "usurping" the policy-making perogatives of the legislative branch, is now inviting Congress to "usurp" its traditional role of finding Constitutional violations and fashioning equitable remedies. *Cf.* dissenting opinion of Stewart, J., 448 U.S. at 527.

CHAPTER FOUR

EQUALITY AND THE CONGRESS: THE LEGISLATIVE HISTORY OF TITLE VI AND E.S.A.A.

The Supreme Court's 1954 decision in Brown v. Board of Education forcefully established the principle that school segregation is inherently inequitable and unconstitutional. In the decade following Brown, however, the judiciary had failed to effectuate the broad changes needed to vindicate this principle. In 1963, over 99% of black children in most Southern states still attended segregated schools.[1]

Judicial tempering during that era was paralleled by a lack firm initiatives in support of the antidiscrimination principle by the legislative and executive branches. Especially striking was the continuation of federal funding to segregated programs in the deep South. Federal money continued to be used to build schools that segregated black children (including the children of black servicemen living on military bases); to build hospitals that excluded black patients and doctors; and to distribute surplus food to whites only. As late as April 1963, neither Congress nor the President had treated civil rights as a priority issue. Unwilling to risk the South's traditional support for the Democratic Party, the Kennedy Administration had proposed no significant civil rights legislation, and civil rights advocates in the House could not even muster a respectable minority in support of their bills.

I. Title VI of the 1964 Civil Rights Act

A. Passage of the Act

In a few short months, this political equilibrium was altered by a dramatic upsurges in popular opinion. Civil rights demonstrations in Birmingham, Alabama and elsewhere in the South had been met with ugly reactions and chilling acts of violence. Responding to the national mood of moral indignation, President Kennedy directed the Justice Department to draft a new civil rights bill. He announced this effort in an eloquent speech calling for just treatment for black citizens.

Kennedy was now committed to pressing for a landmark piece of legislation, which would contain meaningful guarantees of equal treatment. But its passage would require political savvy. It had to be acceptable to the House Judiciary Committee, the full House, and to two-thirds of the Senate in order to terminate an anticipated filibuster.[2]

The administration began serious consultations with Congressional leaders even before putting its bill in final form. Interestingly, Kennedy's speech, and the draft bill, did not address the issue which was to become the core of Title VI, i.e., termination of federal financial support for discriminatory programs. The legislators who were consulted, however, stressed the importance of this issue. Many potentially viable new federal programs (including aid to education) had been killed by Congress in the past because Southern congressmen, who might otherwise support them, could not accept riders -- put on all such bills by Adam Clayton Powell, Chairman of the House Education and Labor Committee--which would preclude the new federal aid for programs that were found to discriminate. If an omnibus civil rights law were passed which included a "uniform Powell amendment," new programs thereafter could be judged on their merits without repeated fights over such civil rights riders.

Reacting to this concern, the Administration added a new section to its proposal -- a predecessor to Title VI that would conferrred discretionary authority upon federal departments to cut off funds to discriminatory programs. The Administration was opposed to a mandatory cutoff requirement because that might compel termination of funding for programs that provided vital services to the very minority persons whose civil rights they were seeking to protect.

After these intitial deliberations, the administration sent Congress an omnibus bill banning discrimination in voting rights, access to (privately owned) restaurants, bus stations, and other public accomodations, and in the use of publicly owned and operated facilities, or federally assisted programs. In the House, the bill was referred to a subcommittee of the Judiciary Committee.[3] To the dismay of Administration officials concerned with the bill's political viability,[4] liberal members of the subcommittee (with the aid of some Southern members who hoped to overload the bill) also added an entire new section banning race discrimination in private employment (Title VII) and they made the federal funding cut-off under Title VI mandatory, rather than discretionary. ("Discretion," the congressmen believed, might well turn into inaction.) The full committee affirmed these changes,[5] and the bill was sent to the House on November 20, 1964.

Two days later, President Kennedy was assassinated. As the shock of the event subsided, newly-inaugurated President Lyndon Johnson had to make a fundamental political decision on whether to support Kennedy's civil rights bill, despite his own Southern origins. He chose to do so, and appealed to the public to treat this bill as a memorial to the late President. He bluntly informed congressional opponents that he was prepared to utilize every bit of his formidable legislative skill to overcome any obstacles they might create.

In February the House passed the Judiciary Committee's bill by a bi-partisan vote of 290 to 130. The bill was sent to the Senate, where its supporters had to overcome both the opposition of the Judiciary Committee and of Chairman Eastland (who was an implaccable foe of civil rights legislation) and the threat of an interminable filibuster. As in the House, exceptional bi-partisan cooperation won the day. By unconventional means, the House bill was maneuvered to the Senate floor without the Senate Judiciary Committee's recommendation. On the floor, under the leadership of Senators Humphrey (Democrat) and Kuchel (Republican), the case for the bill was explained systematically. Simultaneously, Senate leaders and Administration officials formed a quasi-formal, behind-the-scenes negotiating group that hammered out policy compromises.

In the public and private Senate deliberations, (as well as in the press) most attention was focused on the sections of the bill dealing with discrimination in public accommodations (Title II) and in employment (Title VII). The general federal program anti-discrimination provisions of Title VI, which was, in time, to prove the most controversial part of the Act, aroused relatively little concern. Only a handful of Southern Senators foresaw the enormous implications of Title VI.

The Senate debate turned into the longest filibuster in that body's history. It was terminated by a cloture vote on June 10, 1964. On June 19, by a vote of 73 to 27, the Senate approved an amended bill hammered out in the bi-partisan negotiations. It was known as the Mansfield-Dirksen Substitute. Just before Independence Day, the House passed the Senate Bill.[6] The political strategy had worked. Senator Dirksen shared the credit for an historic civil rights law that could be presented to the public as being firm, but moderate.[7]

B. The Structure of Title VI[8]

As it emerged from a year of political bargaining, the section of the Civil Rights Act banning the use of federal funds in programs which discriminate, was balanced and reasonably straightforward. It consisted of five parts. First, §601 established the basic prohibition against discrimination on the basis of race, color or national origin in programs receiving federal financial assistance.[9] The next two sections described the role of the executive,[10] and the judiciary,[11] in enforcing these equal treatment guarantees. The remaining parts of Title VI set forth certain limitations on federal enforcement powers. Specifically, federal agencies were precluded from taking action regarding employment practices "except where a primary objective of the Federal financial assistance is to provide employment,"[12], mortgages and other federally guaranteed contracts were excluded from the coverage of the Act,[13] and enforcement of the Act would be constrained by clearly defined due process procedures.

The limitations on the enforcement powers of the executive and judicial branches were meant to resolve the main problem posed by the Title VI during Congress' deliberations: the dilemma of executive discretion. The lack of a precise definition of the term "discrimination" in Title VI[14] could potentially grant the executive branch extremely broad discretion.

Additional difficulties were posed by the sanction mechanisms. As indicated above, proponents of the Act feared that if a funding cut-off sanction were made discretionary, it might never be used; at the same time, they were wary of mandatory cut-offs that would detrimentally affect the very minority groups they sought to protect.[15] Southern opponents of the Act faced a different dilemma. Obviously, they opposed any federal funding terminations. But if some such enforcement mechanism was unavoidable, they tended to prefer a mandatory standard because then the enforcement authorities could not as easily use discretion to overlook segregation in the North and concentrate their enforcement efforts solely in the South.

The compromise solutions to these problems were worked out through strict procedural requirements which would maximize political accountability. Executive discretion would be limited by "rules, regulations, or orders of general applicability"[16] that the departments and agencies

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were "directed" to enforce under Section 601. The agencies were also required, in formulating their rules, to take into account the policies and objectives underlying the federal programs whose funds might be in jeopardy.[17] Moreover, these agency regulations could not go into effect without the approval of the President. Finally, in individual cases, agencies would have to provide administrative due process -- a hearing and findings on the record prior to any fund termination order[18] -- and the agency decisions would then be subject to judicial review.[19]

In regard to the funding termination sanction mechanism, the enforcement agencies were directed to act consistently with the objectives of the particular program involved and any actual termination orders were required to be filed with appropriate Congressional committees with a "full written report of the circumstances and the grounds for such action." (Congress has no legal authority to override the order, but the order would be automatically stayed for thirty days while under Congressional review.) This mechanism would serve as a general notice to agencies that Congress was monitoring their enforcement efforts.

Congress also tried to discourage use of the cut-off sanction (without sacrificing equal rights) by providing for alternative compliance mechanisms. First, it required federal agencies to give fund recipients ample notice of alleged non-compliance and to make substantial efforts to secure compliance through voluntary means. Second, if voluntary means failed, the agency could -- in lieu of a funding termination -- use "any other means authorized by law" to end discrimination. (Ordinarily, "other means" would consist of a referral of the matter by the agency to the Justice Department with a request that a suit for an injunction be sought to stop the discrimination.)[20]

C. The Drafters' View of Equality[21]

In Title VI, equality and discrimination are two sides of the same coin. Its key section reads:

> "No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program activity receiving federal financial assistance." (emphasis supplied)

This language in essence meant that: "No person shall, on the ground of race, be treated unequally."[22] But what does equality mean in this context? The concept was never clearly defined.[23] Both of the perspectives on equality discussed in chapter two were acknowledged during the debates in Congress. The proponents of the Act generally explained its text in terms suggesting the concept of equality of opportunity. The opponents, however, charged that the statute would lead to governmental imposition of equality of result.[24]

For the liberal sponsors of the bill, Title VI's fund cut-off sanction was a key weapon to assure that discrimination was actually eliminated and meaningful opportunities provided to blacks:

> "The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association."[25]

The proponents also expected, however, that the equality of opportunity promoted by Title VI would work hand in hand with existing and anticipated social welfare programs. Civil rights laws would root out exclusionary practices in public programs and in the private market place, and in the long run would lead to more equal results in the distribution of income, status and power. But, at the same time, affirmative social programs designed to furnish housing, politicial organization, job training, compensatory education, would also be necessary to ameliorate major social problems.[26]

The opponents of the Civil Rights Bill, however, insisted that its provisions would necessarily be interpreted to mandate much more immediate equality of results. In the extensive debate over the employment section of the bill, they repeatedly raised the spectre of employers being forced to hire (or promote) less qualified (or less senior) black workers in preference to more qualified (or more senior) white workers. Senator Russell charged:

> "We may be sure that whether it is imposed in the open regulations or not, in the actual administration of the proposal to provide Federal control of employment in private industry, the end result will be job preference...for those belonging to the minority groups..."[27]

The sponsors strongly denied such scenarios. Senator Humphrey gave this assurance in reference to Title VII:

> "[N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group."[28]

Similarly, in the House debates about Title VII Representative Minish had said:

> "[E]mployment will be on the basis of merit not of race. This means that no quota system will be set up, no one will be forced to hire incompetent help because of race or religion, and no one will be given a vested right to demand employment for a certain job."[29]

To ensure that there was no doubt on this point, a specific provision was written into Title VII to avoid any possible reading of the statute which would require preferential hiring and racial balancing schemes:

> "Nothing contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race...in any

> community...or in the available work force in any community..."[30]

In the relatively short Title VI debate, the a close parallel to the more extensive affirmative action colloquys on the Title VII employment issues was a discussion of racially imbalanced school facilities and student bodies. The supporters of the bill tried to distinguish between officially sanctioned acts of discrimination, which it Act would reach, and conditions of racial imbalance, traced to other causes, which it would not. Rep. Celler remarked that:

> "There is no authorization for either the Attorney General or the Commissioner of Education to work toward achieving racial balance in given schools. Such matters, like appointment of teachers and all other internal and administrative matters, are entirely in the hands of the local boards. This bill does not change that situation."[31]

Two amendments were adopted to satisfy objections regarding such racial balancing. The first explicitly carved out of Title VI's direct coverage all employment practices (except where a primary objective of the federal funding was to provide employment[32]). The second added a provision to Title IV (which dealt with desegregation suits brought by the Attorney General) providing that the Title should not be construed to authorize pursuit of racial balancing in schools, except as required by the Fourteenth Amendment:

> "[N]othing herein shall empower any official or

> court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to ensure compliance with constitutional standards." (Emphasis supplied)[33]

Despite these amendments, however, it is far from clear that proponents totally precluded the possibility of the Act being interpreted and implemented in the future in a manner consistent with equality of result-affirmative action perspectives.[34] The thrust of the drafters' concerns in 1964 was on ending blatant denials to blacks of equal access to basic opportunities in education, employment, public accomodation, etc., particularly in the face of entrenched resistance to court orders in some sections of the South.[35] Because of this focus on overt discriminatory practices, no significant discussions arose about the more complex methods that would be designed to deal with the next generation of civil rights issues -- affirmative action programs and other result-oriented remedies intended to eliminate the vestiges of past discriminatory conduct, and to overcome de facto segregatory patterns.[36]

Thus, a key issue in this regard is the extent to which proponents of Title VI saw it as incorporating constitutional anti-discrimination standards, which presumably would develop in light of future events and judicial reactions to them. If this were the case, proponents might reasonably have expected that Title VI would incorporate result-oriented affirmative action concepts if such notions should become part of subsequently-developed Fourteenth Amendment equal protection doctrines.[37]

Repeatedly, the proponents stressed that Title VI was a remedy for violations of constitutional standards -- nothing more and nothing less.[38] As mentioned earlier, Rep. Powell had regularly attached riders to federal aid bills prohibiting use of funds to support segregated programs. To a large extent, Title VI was seen as a uniform "Powell Amendment," affecting all federal aid. No longer would federal tax money be spent to build hospitals or schools that refused to admit black patients or students. In this context, "discrimination" was equated with "unconstitutional." [39] Sen. Humphrey stated:

> "No one can argue with any degree of sincerity that Federal funds should be administered in a discriminatory fashion...Such is clearly violative of the Constitution."[40]

Similarly, Sen. Ribicoff declared that in passing Title VI "We are 100 years behind the Constitution."[41] Senator Kuchel explained Title VI as a guarantee that federal funds would not be spent "in an unconstitutional manner." It was "furthering a policy of non-discrimination, and thus eliminating defiance of the law of the land."[42] "The law of the land", of course, meant Brown v. Board of Education and related precedents.

The congressmen and senators also seemed to realize that constitutional doctrine was in a state of flux and subject to further development, although this was often stated in a context of assurances about the moderate implications of present interpretations. Senator Humphrey, for example, referred to recent court decisions to assure his colleagues that Title VI would not presently require racial balancing, but he also left the door open to new equal protection standards that might evolve in the future. He cited three federal court decisions that had found racial imbalance to be unconstitutional, but he also noted the opposite holding of the Sixth Circuit Court of Appeals in a case from Gary, Indiana.[43] Thus, equal protection doctrine as it "now stands"[44] did not require correction of imbalance resulting from normal residential zoning. Senator Javits also noted at another point that "the qualifications relate to discrimination, and the courts will pass on the way in which that word is implemented."[45]

In sum, then, Title VI was passed with a clear legislative intent to remove discriminatory barriers in a classic equality of opportunity manner. At the same time, however, by incorporating the constitutional equal protection standard, Congress apparently intended to provide for flexibility in response to changing conditions by tying the statute to the evolution of egalitarian principles in the courts. In this sense, the drafters did not intend to preclude the possibility that Title VI might come to be used to foster equality of result approaches.[46]

II. The Emergency School Aid Act (ESAA)

Congress' bi-partisan enactment of the 1964 Civil Rights Act strongly affirmed the nation's commitment to basic principles of equal opportunity. As noted in the previous section, however, Title VI stated these principles in quite general terms. Consequently, in the area of school desegregation it was left to the Department of Health, Education and Welfare (HEW) and the courts to translate this general notion of equal opportunity into concrete compliance standards. In response to immediate demands from thousands of school districts for clarification of their obligations under the statute, HEW issued guidelines in 1965 (revised in 1966) that became the basis for a burst of enforcement activity by HEW and the courts during the next first few years.

The commencement of this enforcement process, however, brought HEW and the courts face to face with the hard realities of implementation -- resistance to ending openly segregatory practices; creation of new, more surreptitious forms of discrimination, and the persistence of conditions created by past discrimination. These experiences in the South, together with additional enforcement problems encountered as attention turned to segregated schooling in the North, led to a growing realization of the need to reformulate the desegregation guidelines to guarantee better "results".[47]

Two inherent weaknesses in Title VI enforcement had become apparent. First was the dilemma posed by the fund cut-off sanction. It did not allow for graduated pressures. The Title VI sanction, if invoked, would necessitate large-scale funding terminations -- amounting to many millions of dollars in large city districts. Politically, this was not an attractive option for HEW.

The second problem was created by the complex, multi-level enforcement procedures which invited dilatory maneuvers by local school districts. Before its on-going[48] federal funds could be terminated, a school district was entitled to a statement of charges; a negotiation process aimed at voluntary compliance; administrative hearings; an appeal to the Secretary; and judicial review. After exhausting these procedures over several years, the district still could avert interruption of funding by submitting an acceptable plan at the last minute.[49]

The Emergency School Aid Act, enacted into law as Title VII of the Education Amendments of 1972,[50] provided a vehicle for Congress to focus on these school desegregation enforcement problems. The solution the statute incorporated was based on the "carrot" of new money for disticts willing to comply with explicit desegregation standards, in contrast to the heavy "stick" of Title VI funding cut-offs.[51] Denial of ESAA funding would deprive a school district of substantial sums, but it would not raise the practical (and political) problems caused by a total federal funding cut-off under Title VI. Furthermore, a denial of eligibility under ESAA is fully effective immediately. Due process comes afterwards.[52]

The origins of ESAA were unusual and its final form reflected an amalgam of strangely disparate elements. President Nixon had initiated the idea of making large grants of federal desegregation aid, but much of the substance of the actual bill as enacted reflected the input of liberal senators like Mondale, Ribicoff and Javits.[53]

ESAA was proposed by President Nixon six months before the 1970 midterm Congressional elections, as a means to consolidate Republican support in the South. Two years earlier, Nixon had captured the White House with a "Southern strategy" that included suggestions that he would take steps as President to reduce federal school desegregation pressures. Although it was impossible by 1968 to reverse totally the institutional momentum and public expectations created by Brown v. Board of Education and by the Johnson Administration's vigorous implementation of the 1964 Civil

Rights Act, significant changes in civil rights enforcement within the established framework were possible. One step the Nixon Administration took in this direction was to slow enforcement of Title VI by the executive branch. Another was to support anti-busing legislation and to oppose busing orders in court cases to which the Justice Department was a party. ESAA, apparently, was intended to be a third element in this strategy.

In May 1970, President Nixon told Congress that hundreds of Southern school districts needed federal financial assistance to meet the costs of completing desegregation by the following September, as required by court orders and HEW agreements. He asked for appropriations of $1.5 billion in desegregation aid to be spent in fiscal years 1971 and 1972. This money not only would support the dismantling of _de jure_ dual school systems -- a job that was "largely done,"[54] but would also support voluntary efforts in _de facto_ segregated school districts to reduce racial isolation of minority students, or to provide minority students with compensatory education services.[55]

Civil rights advocates in Congress did not trust the Administration's intentions.[56] They thought President Nixon's use of the terms "quality" and "equality" were buzzwords being used as a cover for a retreat from the goal of integration. In the succeeding two-year legislative battle culminating in the passage of ESAA, they tried to limit

HEW's discretion over the expenditure of appropriated funds and to promote innovative and aggressive approaches (such as voluntary metropolitan integration) for attaining stable integration and quality education.[57]

Pending full consideration of his ESAA bill, President Nixon asked for an appropriation of $150 million under existing authority to fund a "start-up" program, called The Emergency School Assistance Program (ESAP). In August 1970, Congress appropriated $75 million and ESAP got underway immediately. Most of the money was spent before the November elections. According to two unchallenged investigative reports,[58] these funds were expended in clear violation of the statutory authorization:

> "[F]unds designed to facilitate the process of school desegregation are granted to districts openly and flagrantly pursuing racist policies which insult and degrade black children."[59]

The reports charged that districts receiving federal "desegregation" funds were transferring property to segregated private academies, maintaining segregated classrooms within ostensibly integrated schools, and dismissing and demoting qualified black teachers and principals. The Administration's procedures were said to invite these abuses because they contemplated rapid processing of applications (36 hour turnarounds)[60], making it impossible for regional OCR staff either to judge the merits of proposals or to investigate the civil rights compliance status of the districts.

The allegations of ESAP abuses made a strong impression on Congress. When the Senate resumed deliberations on desegregation aid in 1971, it reached a consensus fairly quickly on adoption of strong measures to limit the discretion of the Administration in disbursing ESAA funds. Most critical was the addition of a set of four ineligibility provisions.[61] These provisions described practices and conditions that were deemed discriminatory for the purposes of ESAA eligibility and therefore would disqualify a grant application from the competition for awards. They contained strict standards prohibiting: 1) transferring of funds to segregated private schools; 2) the dismissal or demotion of minority staff; 3) the use of student assignment practices that result in classroom segregation; and 4) other practices causing unequal treatment of minority students.

In the areas of employment discrimination and student segregation, Congress adopted an explicit impact test. A school district was to be ineligible for assistance if, after the date of enactment, it

> "had in effect any practice...which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups...or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees..."[62] (Emphasis supplied)

A district also would be ineligible if it

> "had in effect any procedure for the assign-

> ment of children to or within classes which
> results in the separation of minority group
> from non-minority group children for a sub-
> stantial portion of the school day..."
> (Emphasis supplied)

Because of Senator Ervin's insistence that the above-quoted lanaguage on classroom assignment could be used to prohibit all ability grouping, Senator Byrd introduced an amendment, which was adopted, exempting "the use of bona fide ability grouping...as a standard pedagogical practice."

ESAA also provided a procedure by which an applicant's ineligibility under the above standards could be waived. A waiver, however, had to be approved by the Secretary (this function could "not be delegated") and only upon a determination that the practice which had triggered the ineligiblity had "ceased to exist."[63]

In sum, ESAA was a complex, sometimes contradictory, statute that reflected the cross-currents of school desegregation views in the early 1970's. It sought to promote voluntary desegregation through financial incentives and it explicitly reduced the use of busing as an integration mechanism.[64] But, at the same time, it incorporated explicit eligibility standards, impact tests and enforcement mechanisms that, as we shall see in the chapters which follow, were to come to the fore and promote a result orientation in OCR's enforcement activities.[65]

1 G. Orfield, The Reconstruction of Southern Education 23 (1969).

2 The pivotal figures, the administration calculated, were William McCulloch, the senior Republican on the Judiciary Committee in the House, and Everett Dirksen, the Senate Minority leader. If these respected moderate-to-conservative Republicans would support a civil rights bill, they would pull with them the necessary swing votes.

The account of the administration's legislative strategy in this chapter is based largely on interviews with Professor David Filvaroff of the University of Texas Law School. As an assistant to Deputy Attorney General Nicholas Katzenbach, Prof. Filvaroff was substantially involved in administration strategy and in the negotiations with legislators and their staffs. See also Abernathy, "Title VI and the Constitution: A Regulatory Model for Defining 'Discrimination'", 70 Geo. L. J. 1, 4-10 (1981).

3 Subcommittee No. 5 held 22 days of hearings between May 8, 1963 and August 2, 1963. The hearing involved 101 witnesses and 2,649 pages of transcripts and exhibits. Civil Rights: Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary. 88th Cong., 1st Sess. (1963). Also Attorney General Kennedy testified at length before the full Committee on October 15 and 16, 1963. Civil Rights: Hearings on HR 7152 as amended by Subcomm. No. 5, House Committee on the Judiciary, 88th Cong., 1st Sess. 2651-2780 (1963).

4 Filvaroff Interview.

5 However, it did tone down the subcommittee bill in other respects. Most notably, it added a proviso excluding from Title VI's coverage, federal assistance in the form of any "contract of insurance or guarantee." What the legislators had in mind was home mortgage assistance. This exclusion was to ensure that Title VI could not be used as an open housing law.

6 The unusual procedures involved in the passage of the Act have deprived legal researchers of some of the prime materials normally used to determine legislative intent. Since the House immediately accepted all of the Senate amendments, rather than negotiating a compromise, there was no House-Senate conference committee report. Furthermore, because the Senate amendments were worked out on the floor and in an unofficial negotiating group, there is no authoritative Senate committee report. (The original report of the House Judiciary Committee, of course, does not address the substance of later amendments in the Senate.) However, the unusually careful management of Senate floor debate by Senator Humphrey and other sponsors of the bill provide a well-developed record which justifies assigning more weight to the floor debates in analyzing the legislative history of this bill than in other situations.

7 An important dimension of this "moderation" was addressed to constituencies in the North. An amendment to Title IV relating to "racial balance" was some assurance that federal officials would not be trying to remedy northern style de facto segregation. And in Title VI itself, the exclusion for "contracts of insurance or guarantee" would prevent federal funding leverage from being used against housing discrimination. See n. 5, supra.

8 The full bill in its final form, Pub. L. No. 88-352, 78 Stat. 241 (1964), contained the following components: Title I (voting rights); Title II (public accommodations); Title III (public facilities); Title IV (public school desegregation); Title V (U.S. Commission on Civil Rights); Title VI (federally assisted programs); Title VII (equal employment opportunities); Title VIII (registration and voting statistics); Title IX (intervention on behalf of plaintiffs by Attorney General); Title X (community relations service); Title XI (misc. provisions).

Title VI was codified at 42 U.S.C. §§2000d - 2000d-4. Section 2000d-5 was added in 1966 and Section 2000d-6 was added in 1970.

9 "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the bene-

fits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

10 42 U.S.C. §2000d-1.

11 42 U.S.C. §2000d-2.

12 42 U.S.C. §2000d-3.

13 42 U.S.C. §2000d-4.

14 One reason "discrimination" had been left undefined is that Attorney General Robert Kennedy and other administration officials had told Congress that federal funding programs were too numerous and too diverse to neatly fit within a single definition. See testimony of Attorney General Kennedy before the House Judiciary Committee in Civil Rights: Hearings on HR 7152 Before the House Comm. on the Judiciary, 88th Cong. 1st Sess. 2652-2771 (1963). See also letter from Deputy Attorney General Nicholas Katzenbach to Chairman Emanuel Celler reprinted in id. at 2772-79; Filvaroff Interview. Other reasons related to the Congress' inability to reconcile the fundamental ideological inconsistencies between equality of opportunity and equality of results are discussed in the balance of this chapter.

15 In the debates, Senator Humphrey observed:

> "The unhappy experience in Prince Edward County, Va., shows that, while everyone suffers when public schools are closed, Negroes are the hardest hit. The same is true when the level of school services is reduced. What is needed, therefore, is a balance between the goal of eliminating discrimination and the goal of providing education, food, and so forth, to those most in need of it, including Negroes and members of other minority groups. Title VI in its present form seeks to preserve enough flexibility in method [sic] of achieving compliance to make such a balance possible."

Quoted in 2 Statutory History of the United States: Civil Rights 1222 (B. Schwartz, ed. 1970). (Hereinafter cited as Schwartz).

16 (Emphasis supplied). §602; 42 U.S.C. §2000d-1.

17 These rules "shall be consistent with achievement of the objectives of the statute authorizing the financial assistance..." 42 U.S.C. §2000d-1.

18 Id.

19 Judicial review would be pursuant to the Administrative Procedure Act 5 U.S.C. Sec. 701-706, with the statutory stipulation that agency actions pursuant to 601 "shall not be deemed committed to unreviewable agency discretion..." 42 USC Sec. 2000d-2.

20 After 1964, Congress enacted certain amendments to Title VI that affected the enforcement procedures. In 1966, following an abortive effort by the Office of Education to defer $32 million in federal funds from the Chicago School District (see Ch. 5, infra at (5-6), Congress added a provision limiting the duration of deferral of action by the Commissioner of Education on funding applications to 60 days, unless the applicant is afforded a prompt administrative hearing culminating in "an express finding on the record" that the applicant has engaged in discrimination. Pub. L. No. 89-750, Title I, §182,80 Stat. 1209 (Codified as amended at 42 U.S.C. §2000d-5.) In 1970, a provision was added requiring that Title VI be applied "uniformly" in all regions of the country. This amendment originated as the "Stennis Amendment" which was to apply the same legal standards to de facto and de jure segregation. But this intention was diffused by a provision added over the Senator's objection which defined "uniformly" to mean a single policy for de jure segregation "wherever found" and a single policy for de facto segregation "wherever found." Pub. L. No. 91-230, §2, 84 Stat. 121; (Codified as amended at 42 U.S.C. Sec. 2000d-6 (1970)).

In addition, Congress passed a confusing array of provisions, not all of them codified with Title VI, that substantially affected Title VI enforcement. The most important of these were anti-busing provisions, prohibiting the Department of Health, Education and Welfare from requesting "voluntary" desegregation remedies that include mandatory reassignment of pupils to schools outside their neighborhoods. See e.g., P.L. 94-206, §209, 90 Stat. 22 (1976) (Byrd Amendment); P.L. 93-380 Sec. 215(a), 88 Stat. 517 (codified at 20 U.S.C. §1714(a) (1976)) (Esch Amendment); P.L. 93-380, Sec. 203(b), 88 Stat. 514, (codified at 20 U.S.C. §1702(b)) (1976) (Scott-Mansfield Amendment -- weakening effect of Esch Amendment); P.L. 94-206; Sec. 208(b), 90 Stat. 22 (1976) (Eagleton-Biden Amendment). See generally Brown v. Califano, 627 F.2d 1221, 1226-1227, ns.26-27 (D.C.Cir. 1980).

21 Bakke and the other major affirmative action cases have caused lawyers and courts to focus in detail on the legislative intent behind Title VI. Methodologically, the analysis of legislative intent set forth in this section is more strictly historical than the approach taken in these judicial decisions. For example, consistent with the Court's responsibility to decide the issues posed by the case at the time it reached the Court, Justice Brennan's detailed analysis of legislative intent in Bakke draws upon "[t]he legislative history of Title VI, administrative regulations interpreting the statute, subsequent congressional and executive action, and the prior decisions of [the Supreme] Court..." 438 U.S. at 328. In our interpretation, however, we rely almost exclusively on the contemporaneous legislative materials, because our concern is to compare and contrast those materials with later "administrative regulations,...[and] subsequent congressional and executive action..."

22 At first glance, it might appear that while the operative term "discrimation" is ambiguous, the other operative terms, "excluded" and "denied benefits" are fairly precise. But without reference to a concept of equality, even the latter terms lack substantial meaning. For example, in Lau v. Nichols, 414 U.S. 563 (1974) the Supreme Court had to decide whether non-English speaking children who were admitted to a school system on the same basis as those who were proficient in English were nevertheless "excluded" from or "denied" the benefites of "educational services." Clearly, considerations of "fair opportunity" and "results," were inherent in the consideration of whether these students were improperly "excluded."

23 Representative Harris stated: "Nowhere in the bill is this word defined so it can only be drawn from inference from the language of the bill or

defined by courts at such later times as it becomes necessary and in such a manner as may at the time prove convenient." 110 Cong. Rec. 1923 (1964).

Congress' failure to clearly define the operative egalitarian concepts, discussed here in regard to the 1964 Civil Rights Act (see, Bryner "Congress, Courts and Agencies: Equal Employment and the Limits of Policy Implementation," 96 Pol. Sci. Quart. 411 (1981) for a discussion of ambiguity in the bill's equal employment provisions), also appears to have extended to other areas of anti-discrimination legislation. See, e.g., Schuck, "The Graying of Civil Rights Law: The Age Discrimination Act of 1975" 89 Yale L.J. 27 (1979).

24 Some opponents of the Act indicated that they might accept a bill based on the type of "conservative" or "formal" equality discussed in chapter two, n.32. The formal equality positions was that if a law or policy was, on its face, color blind, then it was ipso facto non-discriminatory. For example, a freedom of choice enrollment plan in a formerly de jure segregated school district was said to afford equal treatment even though it was well known that blacks who sought to enroll their children in white schools were subjected to threatened (and actual) retaliation by employers, landlords, officials, etc. From this point of view, sufficient "egalitarian" rights existed and if blacks had not taken advantage of them, this was because of their own failings. Thus, Representative Abernethy warned that the stronger egalitarian approach of the bill:

> "would rob all Americans of precious freedom on the theory that this can give economic, cultural, and social equality to a minority of Americans who, let us face it, have failed to achieve such equality on their own initiative."

2 Schwartz supra, n.15 at 1133 (1970).

25 110 Cong. Rec. 1519 (1964) (Remarks of Rep. Celler.)

26 See remarks of Senator Humphrey at 110 Cong. Record 5022 (1964) and 2 Schwartz, supra n.15 at 1234

27 110 Cong. Rec. 4746 (1964). Similarly, Senator Russell warned:

> "Any effort to legislate social equality can have only one effect, and that is to bring down our people to the lowest common denominator. I do not believe that there can be any such thing as compulsory equality."

110 Cong. Rec. 4753 (1964).

28 110 Cong. Rec. 5423 (1964).

29 110 Cong. Rec. 1600 (1964).

30 42 U.S.C. §2000e-2(j). This provision became the central focus of the Supreme Court's consideration of The Kaiser Aluminum Company's 50% quota for its apprenticeship training program in United Steelworkers of America v. Weber, 443 U.S. 193 (1979). (See p. 80, supra.) Although the company had clearly instituted the program in response to pressures from the Equal Employment Opportunities Commission, it was held to be "voluntary" because it had not been mandated by a court order. The Supreme Court's majority opinion, written by Justice Brennan, held that Congress intended to "permit" such affirmative action programs because otherwise the above-quoted section would have clearly spelled out that Title VII was not intended either to "require" or to "permit" preferential treatment. Since Title VII was designed to maximize voluntary efforts by private employers to promote minority employment, Congress could not have meant to preclude voluntary plans that would achieve this result. However, this interpretation of the legislative history had to distinguish numerous remarks by supporters of the Act indicating that Title VII would not allow establishment of systems "to maintain racial balance in employment." Justice Rehnquist and Chief Justice Burger, in dissent, strongly pressed these references and argued that the language of the statute clearly prohibited racial preferences. The majority was accused of convoluted semantics and a biased reading of the legislative history.

31 2 Schwartz, supra n.15, at 1104.

32 "Nothing contained in this sub-chapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a pri-

mary objective of the Federal financial assistance is to provide employment." Section 604, 42 U.S.C. Sec. 2000d-3.

It is important to note, however, that Senator Humphrey interpreted this employment amendment as not precluding use of the fund cut-off sanction in cases where "racial discrimination in employment or assignment of teachers...affected the educational opportunities of students..." 2 Schwartz, *supra*, n.15, at 1218 (1970).

33 42 U.S.C. Sec. 2000c-6. Senator Humphrey explicitly assured the sponsors of the bill that the Administration intended this provision in Title IV to apply also to Title VI. 2 Schwartz, *supra* n.15, at 1345 (1970). Interpretive problems still remained, however, since under Title VI, federal officials do not "issue orders", but instead make findings of non-compliance and withhold funds.

34 Indeed, Title VII, as originally enacted in 1964, specifically incorporated an "impact" standard (*See* pp.23-25, supra) in its operative definition of unlawful employment practices. Thus, 42 U.S.C. 2000e-2 prohibits the use of employment selection devices which are "designed, intended *or used* to discriminate because of race, color, religion, sex or national origin" (emphasis added). *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Although racial imbalance *per se* would not trigger liability, a heavy burden would be placed on employers to justify the job-relatedness of employment selection devices which resulted in racial imbalance. In practice, this impact test has tended to promote implementation of result-oriented, affirmative action approaches. See Rebell & Block "Competence Assessment and the Courts: An Overview of the State of the Law" in *The Assessment of Occupational Competence*, ERIC Document No. ED 192-169 (1980), A. Wigdon and W. Garner, eds., *Ability Testing: Uses, Consequences and Controversies, Part I: Report of the Committee on Ability Testing, Assembly of Behavioral and Social Sciences, National Research Council*, 101-5 (1982), *Cf.* Bartholet, "Application of Title VII to Jobs in High Places", 95 Harv. L. Rev. 947 (1982).

35 "[Title VI] was necessary to rescue school desegregation from the bog in which it had been trapped

for ten years." United States v. Jefferson County Board of Education, 372 F.2d 836, 856 (5th Cir. 1966).

36 "The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of Federal moneys...Over and over again, proponents of the bill detailed the plight of the Negroes seeking equal treatment in such programs. There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment." Bakke, 438 U.S. at 285 (Powell, J.).

37 In Bakke, five of the Justices (The Brennan group and Justice Powell) concluded that Congress had intended to incorporate developing constitutional standards (although Justice Powell differed from the others on how these standards had developed). Although the four Justices of the Stevens group disagreed and argued that Congress clearly meant to codify a "color blind" equality of opportunity perspective, regardless of later constitutional developments, two of them (Justices Stewart and Rehnquist) later joined in a dissenting opinion in Board of Education v. Harris, 444 U.S. 130, 152 (1979) that intimated an acceptance of the majority view on this point.

38 There was one significant exception to this conclusion. The Fourteenth Amendment only regulated "state action", and Congress realized that some federal fund recipients might be considered purely private entities. Title VI provided that "private" fund recipients would still have to meet constitutional discrimination standards. See 110 Cong. Rec. 12677 (1964) (Sen. Allott).

39 The drafters and legislative leaders also were aware that Title VI's coverage would be broader than the constitution because some federally assisted programs might remain sufficiently nongovernmental as to fail the "state action" requirement; but the discrimination standard that would be applied to any person subject to Title VI was perceived to be the "constitutional" one.

40 110 Cong. Rec. 5253 (1964).

41 110 Cong. Rec. 7057 (1976).

42 110 Cong. Rec. 6562 (1964).

43 Bell v. School Board, City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964).

44 2 Schwartz, supra n. 15, at 1344 (1970). He went on to say: "if the bill were to compel [integration], it would be a violation [of the constitution] because it would be handling the matter on the basis of race and we would be transporting children because of race." Id. at 1345.

45 110 Cong. Rec. 6050 (March 24, 1964). In discussing the de facto - de jure distinction as it was raised in the Title IV context, Senator Humphrey noted that:

> "The key purpose of the pending Dirksen-Mansfield-Humphrey-Kuchel substitute is to make clear that the resolution of these problems is to be left where it is now, namely, in the hands of local school officials and the courts.... Obviously, this provision could not affect a court's determination concerning racial imbalance and possible corrective measures; this is dependent upon the court's interpretation of the 14th amendment."

110 Cong. Rec. 13820 (1964).

46 In a provocative and detailed article, "Title VI and the Constitution: A Regulatory Model for Defining 'Discrimination'", 70 Geo. L.J. 1 (1981), Professor Abernathy challenges the generally accepted premise that Congress intended to enact some general standard of discrimination, in the 1964 Civil Rights Act. Relying upon the history of compromises in the House of Representatives about amendments to the administration bill, Abernathy argues that Congress intended for each federal agency to define "discrimination" in the context of its programs. Hence, Abernathy would convert the broad debate about legislative intent and constitutional principles into a problem of administrative law, i.e., how the executive branch may exercise properly the broad delegation of authority conferred upon it by Congress.

Although, as indicated in the discussion in Chs. 5 and 10, we agree that Title VI conferred substan-

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tial policy making authority on federal departments and agencies, we believe Abernathy's thesis overstates the point. The House deliberations and, particularly, the Senate debates, were infused with the basic notion -- however muddied at times -- of *unconstitutional* discrimination. The carefully managed presentations and colloquies on the Senate floor, and the efforts by the Administration and Senator Humphrey to win Senator Dirksen's support were more than "constitutional rhetoric" (at 48). Moreover, reluctant Senators and Representatives were reassured by sponsors of the legislation that it would not lodge great discretion in the hands of agency officials.

Thus, the delegation of policy-making authority under Title VI, although extensive, was a delegation limited by constitutional principles being developed within the framework of an equal opportunity ideology (and, in this sense, it was a delegation both to the courts and to the executive).

[47] *See* G. Orfield, *The Reconstruction of Southern Education* (1969); Note, "The Courts, HEW, and Southern School Desegregation," 77 Yale L.J. 321 (1967). *See also*, discussion in Chap. 5, *infra*.

[48] Federal departments can, however, initially defer funding for new programs. In 1965, the first year of The Elementary and Secondary Education Act, HEW (without express statutory authority) deferred funds for many school districts because of alleged Title VI violations. Following the political uproar caused by HEW's deferral of funds for Chicago (*See* pp. 136-137, *infra*), Congress amended Title VI in 1966 to provide that this interim sanction could only be used for an extended period if HEW conducted hearings and made findings of violations on the record. *See* 42 U.S.C. 2000d-5; *Board of Public Instruction* v. *Cohen*, 413 F.2d 1201 (5th Cir. 1969).

[49] *See*, *e.g.*, *Mandel* v. *HEW*, 411 F.Supp. 542 (D. Md. 1976) (Injunction issued against Title VI enforcement by OCR pending clearer specification of steps necessary for compliance), *Board of Public Instruction* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969) (Title VI fund cut-off reversed, because lower court findings were not "programatically oriented").

50 Pub. L. No. 92-318, Title VII, *86 Stat. 354 (1972), codified* as amended at 20 U.S.C. §§1601-1619; *amended,* Pub. L. No. 95-561, Title VI, 92 Stat. 2252 (1978), and recodified at 20 U.S.C. §§3191-3207; amended, Pub. L. No. 97-35, Title V, Sec. 577(3) and (7), 95 Stat. 474 (1981), and recodified at 20 U.S.C. Sec. 3832 (3) and (7). (Elementary and Secondary Education Block Grant). References to the Emergency School Aid Act will be to the first codification at 20 U.S.C. Sec. 1601-1619. Title VIII of the Education Amendments of 1972 contained provisions restricting the use of busing to achieve desegregation. *See* discussion at pp. ____ *infra*.

51 As we shall see in Chs. 6 and 7, OCR in later years tended to combine these carrot and stick approaches to gain maximum leverage in its compliance negotiations with local school districts.

52 Note also that unless the school district obtains a federal court injunction reserving its claimed funds, the money for the current fiscal year will be spent elsewhere. Furthermore, because ESAA grant applications are considered on one-year cycles, school districts are subject to frequent OCR reviews of their continuing compliance.

53 Senator Javits, the Republican Senator from New York with a liberal record on civil rights, was the Senate sponsor in 1970 of the original Administration bill and he played a principal role as a facilitator and mediator through the two years of deliberations. His involvement in the passage of this bill (and of Title VI of the 1964 Civil Rights Act) must have been a factor in his measured responses to complaints by New York City education officials and union officials about OCR's enforcement activities under these two statutes. See pp. 241-242, note 92.

54 116 Cong. Rec. 18109 (1970).

55 Under President Nixon's funding formula, districts desegregating under court orders or HEW agreements would receive twice as much aid as districts trying to achieve racial balancing voluntarily. Thus, districts that had been found to be in violation of the Constitution sixteen years after *Brown* v.

Board of Education would, in essence, be receiving "a bonus".

56 One commentator summarized this skeptical view as follows:

> "The South's remaining segregated schools had to desegrate, the Supreme Court and the lower federal courts had made further delay impossible, and the Administration had no practicable choice but to make the process as acceptable and rewarding as it could. Most of the requested $1.5 billion in special funds...is earmarked, Congress willing, for Southern school districts that are integrating now or have integrated in the past two years...the chief and declared objective is to reward while helping the white South in its enforced surrender to integration."

J. Osborne, The First Two Years of the Nixon Watch 85-86 (1971), quoted in G. Orfield, Congressional Power: Congress and Social Change 174 (1975).

57 For example, Senator Mondale's Quality Integrated Education Act of 1971 (S. 683) reserved "40 to 45% of the funds for creating and maintaining stable, quality, integrated schools", "10 to 15% of the funds for promising pilot programs in racially or ethnically isolated schools in districts with over 50% minority students or 15,000 minority students"; " 10% of the funds for education parks"; "10% of the funds for the Commissioner to allocate as he sees fit among the various activities authorized in the Act"; 6% of the funds for funding private non-profit groups to promote equal educational opportunity by encouraging the participation of parents, students and teachers in the education process"; "5% of the funds for integrated children's education television programs"; "3% of the funds...for reimbursement of attorneys' fees"; and 1% of the funds...for evaluation." 117 Cong. Rec. 2183 (1971).

The proponents of a liberal ESAA, then, were not consciously promoting a new or radical equality principle. They wanted to made the old one work. The "real issue," said Mondale, is how to "recapture" the federal government's concern for the educational needs and equal educational opportunity of "all of our children." 117 Cong. Rec. 2177 (1971).

58 One was done by the General Accounting Office ("Need to Improve Policies and Procedures for Approving Grants Under the Emergency School Assistance Program", excerpts of which are reprinted at 117 Cong. Rec. 6658-59 (1971)) and the other by a joint project supported by six civil rights groups: American Friends Service Committee; Delta Ministry of the National Council of Churches; Lawyers Committee for Civil Rights Under Law; Lawyers Constitutional Defense Committee; NAACP Legal Defense & Education Fund, Inc.; and Washington Research Project. ("The Emergency School Assistance Program - an Evaluation," excerpts of which are reprinted at 116 Cong. Rec. 43956 (1970).

59 116 Cong. Rec. 43963 (1970), quoting the civil rights group report, "The Emergency School Assistance Program: An Evaluation." The report was based on nearly 300 on-site visits and a review of over 350 funding applications. In fewer than 10% of districts visited was there no evidence of illegal practices. 116 Cong. Rec. 43956 (1970).

60 116 Cong. Rec. 43958 (1970). One application was approved by HEW before being received! 116 Cong. Rec. 43955 (1970) (remarks of Senator Mondale).

61 20 U.S.C. Sec. 1605(d)(1)(A)-(D). The language of these provisions actually originated in the "assurances" required under the HEW regulations for the ESAP program. Senator Mondale's Quality Integrated Education Act incorporated the language as statutory eligibility requirements; these requirements were adopted almost verbatim from Mondale's bill into the Act.

62 20 U.S.C. Sec. 1605(d)(1)(B). In Board of Education v. Harris, 444 U.S. 130 (1979), the Supreme Court held that the second clause -- "or otherwise engaged in discrimination" -- was also intended by Congress to constitute an "impact" test.

63 The Nixon Administration expanded this narrow waiver provision by issuing a regulation permitting a waiver upon a showing that the school district is "making progress" towards desegregation. 38 Fed. Reg. 18899 (1973) (to be codified at 45 C.F.R. 185.44(d)(3)). The United States Court of Appeals for the District of Columbia Court held that this

regulation was inconsistent with the statute. (*Kelsey* v. *Weinberger*, 498 F.2d 701 (1974)). Several years later, however, when OCR under the Carter Administration tried to enforce strictly the "cease to exist" language in New York, the Second Circuit Court of Appeals reached the opposite conclusion and held that a phased-in plan was sufficient. *Board of Education* v. *Harris*, 622 F.2d 599 (2d Cir. 1979), *cert. denied sub. nom. Hufstedler* v. *Board of Education*, 449 U.S. 1124 (1981).

64 ESAA prohibited federal funding for busing and encouraged experimentation with a number of other integration techniques which were not as politically sensitive, such as interracial programs, minority language programs, mobile units, and teacher education. For a detailed discussion of the politics and legislation of busing, *see* G. Orfield, *Must We Bus?* (1978).

65 At the present time, the Department of Education's grant compliance enforcement activities under ESAA are being substantially terminated through the Reagan Administration's "block grants" legislation. Under the Education Consolidation and Improvement Act of 1981, federal desegregation aid was made part of multi-purpose education block grants to be allocated and administered by the states, effective October 1, 1982. Pub. L. No. 97-35, Title V, Sec. 577(3) and (7), 95 Stat. 474 (codified at 20 U.S.C. Sec. 3832 (3) and (7) (1981)).

CHAPTER FIVE

IMPLEMENTATION OF TITLE VI, 1964-1974

I. The Johnson Years: 1964-68

When the 1964 Civil Rights Act was passed, only one-fifth of the school districts in the South had even begun to desegregate and almost all of the black children in the Southern states still attended all black schools.[1] As noted in the previous chapters, this miniscule progress during the decade following Brown v. Board of Education reflected a general judicial posture of gradualism.

In this setting, it was far from clear how the newly-enacted Title VI would be implemented and whether its passage would substantially accelerate the pace of school desegregation. Title VI called upon the Department of Health, Education and Welfare to devise regulations and procedures to end discrimination in federally assisted school programs.[2] Within HEW, the key agency was the Office of Education (OE). OE's capabilities as a civil rights enforcement agency were questionable, however, since, as Prof. Orfield has observed, "[i]t is difficult to imagine any agency less prepared in terms of temperament, tradition, and philosophy to forcefully set in motion a major social revolution."[3] OE officials were accustomed to providing financial and technical assistance to local and state school officials in a somewhat deferential manner, in keeping with traditions of federalism and local control. Forceful implementation of desegregation mandates was not fully compatible with these established, politically acceptable modes of operation.

Thus, the initial HEW enforcement stance on school desegregation was quite moderate. The first regulation, issued in December 1964, provided that a school district could establish compliance with Title VI by providing assurances that it would comply either with a court-ordered desegregation plan or with a desegregation plan determined by a responsible Department official to be "adequa[te] to accomplish the purposes of the Act."[4] No specific standards for the "adequacy" of such plans were set forth nor were any time lines or guarantees of specified results required.

The next year, however, the atmosphere changed sharply. The key precipitating event was passage of the 1965 Elementary and Secondary Education Act (ESEA). Because Title VI had eliminated the Powell amendment roadblock to passage of major school aid legislation,[5] the Administration was able to gain passage of ESEA, which became the most massive federal education aid program in history.

Enactment of ESEA dramatically enhanced the significance of the Title VI fund termination sanction. So long as federally funded programs had been small and scattered, HEW had little leverage for building a national anti-discrmination program. But the awarding of large ESEA grants to almost all of the nation's 25,000 school districts gave HEW the potential ability to compel the districts to adopt meaningful Title VI compliance plans.[6]

Early in 1965, as passage of ESEA became eminent, state and local school officials, especially from the South, began to pressure OE staff for instructions on Title VI compliance; specifically, they sought information on the criteria that would be used to determine the acceptability of their desegregation plans. OE was not geared up to provide these answers. Consequently, a group of legal consultants headed by Professor G.W. Foster, Jr., a Southerner who was teaching at the University of Wisconsin law school, was established to try to formulate effective standards.[7]

As the Foster group moved forward with its assignment, serious differences of opinion apparently developed among top OE officials on the question of issuing formal written standards. Assistant Secretary James M. Quigley opposed the development of formal standards. He preferred to maximize pressures for desegregation through negotiations on a case-by-case basis. Any "minimum" standards issued by OCR, he feared, would quickly become "maximum" standards as well. David Seeley, newly appointed

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chief of the OE's Office of Equal Educational Opportunity (OEEO) and OE Comissioner Francis Keppel, however believed that effective administrative enforcement of school desegregation had to be "regularized, formalized and made predictable."[8] Eventually, the substantive content of the standards being developed by the OE consultant group were made available to the general public. Initial dissemination took a most unusual form:

> "Consultant Foster - speaking for 'himself' -- published an article detailing the OE requirements for compliance in a March issue of the Saturday Review of Literature. . . The article was circulated in reprint form to school districts throughout the country . . .[and] was initially viewed as a quasi-official way for the agency to circulate its standards without getting the Department's formal agreement."[9]

A month later, the substance of the Foster group standards was adopted as a general policy statement of the department.[10] This statement, the "1965 Guidelines", cautiously reflected the equality of opportunity premises that underlay Title VI's legislative history, and the trend of contemporary court decisions. Most notably, the guidelines accepted freedom of choice desegregation plans -- although the rules did go beyond many of the court cases in spelling out a series of requirements to make "choice" a real opportunity for minority parents. (For example, parents and students were to receive reasonable notification of available choices, and all involved parties were to be prepared for the process of transfers.) The guidelines also emphasized requirements for faculty and staff desegregation,[11] apparently at the specific direction of President Johnson who had strongly and publicly condemned wholesale discriminatory firing of black teachers in a number of school districts.[12] Finally, the guidelines designated fall 1967 as the fixed target date for desegregation of dual school systems not already committed to earlier deadlines.

On paper, the 1965-66 school year went smoothly. Suitable compliance assurances were received from thousands of school districts. In term of actual desegregation, however, OE's efforts yielded few results. Either the plans were violated (in letter and in spirit) or else the freedom of choice mechanisms constituting most of the plans proved ineffectual in practice. The September 1967 target date set forth in the guidelines for full desegregation clearly was not going to be met at that pace.

At the same time that OE's small, overworked civil rights staff was concentrating on applying its school desegregation guidelines to thousands of Southern school districts, a major Title VI compliance issue also arose in the North. A federation of Civil Rights groups had sent HEW a detailed complaint alleging that the Chicago school system was actively pursuing policies of racial segregation, in cooperation with public housing authorities and the Chicago

Real Estate Board. After a preliminary investigation by HEW staff, Commissioner of Education, Francis Keppel, sent the Illinois School Superintendent a letter, on October 1st, announcing that approximately $32 million dollars in federal fundings for Chicago would be deferred (rather than cancelled altogether) pending further investigation.

The political backlash was immediate and intense. Within five days, Chicago's Mayor Daley had met with President Johnson, the President had communicated with HEW officials, and HEW had reversed itself.[13]

The Chicago incident had two major effects on HEW's civil rights enforcement efforts. First, HEW henceforth would shy away from any significant enforcement activities outside the South.[14] Second, John Gardner, the Secretary of HEW, decided to establish a new Office for Civil Rights (OCR) reporting directly to him--rather than to the OE hierarchy--in order to maximize political accountability. As the small Office for Civil Rights grew in response to increasing enforcement pressures,[15] the Secretary's ability to supervise directly its activities became more difficult; somewhat ironically, therefore, its separation from OE tended to strengthen its independent authority and its effectiveness and allowed civil rights enforcement activities to become focused in the hands of a centralized core of specialists dedicated exclusively to a civil rights compliance mission.

The experience of the first year of enforcement under Title VI caused the administrators, lawyers and investigators in the newly designated Office for Civil Rights to think in more result-oriented terms. To deal with a rapidly growing case load and increasingly complex enforcement obligations, OCR drew up a new set of guidelines which were issued in April of 1966.[16] These were both detailed and more result-oriented than their predecessors. They introduced such requirements as the uniform application of testing instruments and other methods for making student assignments. Objective performance criteria, like the "positive duty to make staff assignments necessary to eliminate past discriminatory assignment patterns"[17] were also added. And, it was announced that henceforth freedom of choice plans would be judged in terms of their actual results, as shown by explicit statistical improvements in racial balance.[18]

Needless to say, the more forceful result-oriented standards of the 1966 guidelines met strong negative reactions from many southern school districts, who claimed that OCR had gone beyond Congress' intention. Challenges to OCR's legal authority were made in both judicial and political forums.

OCR's interpretation and authority was, however, upheld by the Courts. The key decision was that of the United States Court of Appeals for the Fifth Circuit in

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United States v. Jefferson County Board of Education,[19] which validated the 1966 guidelines. The Jefferson County decision was a landmark case for Title VI enforcement in the South. Because the original HEW regulations had specified that compliance with Title VI could be met either by filing a desegregation plan acceptable to OCR, or by complying with a plan approved by a court, a number of Southern districts had adopted the strategy of trying to play off the courts against OCR. As the HEW standards became tighter, these districts rushed to court to obtain judicial approval for desegregation plans which clearly would not meet the more stringent HEW guidelines.[20] But in Jefferson County, the Fifth Circuit held that the courts should defer to the HEW guidelines precisely because "the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation."[21] The congressional preference, the court announced, was for effective enforcement by HEW on a national scale rather than to continue case-by-case adjudication through the courts:

> "We read Title VI as a Congressional mandate for change - change in pace and method of enforcing desegregation.

In March of 1968, as its final major action in this field, the Johnson Administration issued a new set of school desegregation guidelines. Responding to the Green amendment,[23] the guidelines were made more general, for use in all parts of the country. Thus, the previous focus on techniques for dismantling de jure dual school systems was replaced by standards aimed at a wide variety of complex discriminatory patterns that were developing in both the South and the North.[24] Despite the omission of some of the detailed criteria of the former guidelines, a fundamental result-oriented approach was maintained: school systems with a history of discrimination were told they were "responsible for taking whatever positive action may be necessary to correct the effects of the discrimination,"[25] and that "compliance with the law requires integration of faculties, facilities, and activities, as well as students, so that there are no Negro or other minority group schools and no white schools -- just schools."[26]

By the end of the Johnson Administration's tenure, OCR had proved its efficiency in bringing about desegregation in Southern school districts. In the first six years of enforcement of Title VI, 600 administrative proceedings had been undertaken against school districts and fundings was actually terminated in 200 of them (in all but 4 of these districts, however, the federal aid was subsequently restored).[27] Virtually all Southern school districts were implementing school desegregation plans, and, by 1968, 32% of black students (compared to 1% in 1964) were attending integrated schools.

II. The Early Nixon Years: 1969-1971

Although Richard Nixon had campaigned for the

Presidency with promises of relieving compliance pressures in the South, more school desegregation was actually achieved in the first three years of his administration than ever before. By 1972,

> "[O]nly 8.7 percent of black students in the states of the 'Old Confederacy' were still attending all (90 percent or more) black schools; the figure had been 68 percent when the Johnson administration left office four years earlier and was estimated at higher than 98 percent when the Civil Rights Act was enacted four years before that."[28]

Much of this progress was compelled by the Supreme Court's tough mandates in such cases as Green and Swann, which forced the Nixon administration to accept the inevitability of eliminating traditional *de jure* segregation in the South.

But the new administration undertook few new enforcement initiatives. On the contrary, it tried to slow down the desegregation activities both of HEW and the courts. On July 3, 1969, Secretary of HEW Finch and Attorney General Mitchell issued a joint policy statement announcing that HEW would not use the fund cut-off sanction to ensure Title VI compliance. Instead, if HEW could not achieve compliance by voluntary means, the matter would be referred to the Justice Department to consider initiating a court suit for injunctive relief. At the same time the Justice Department was adopting new procedures, such as substantially increasing the threshold evidentiary requirements for commencing litigation, that would severely limit the number of new suits that could be prosecuted with existing departmental resources. At this time, the Justice Department also took the unprecedented step of siding with Southern school districts rather than with the NAACP Legal Defense Fund on the critical issue of accelerating implementation of desegregation mandates in the arguments before the Supreme Court in Alexander v. Holmes County Board of Education,[29].

The administration's new approach was rebuffed. First, in Alexander, the Supreme Court issued a stinging rebuke to the Justice Department and the southern defendants by ordering the immediate desegregation of most southern districts by the fall of 1970. Then, in April, 1971, in Swann v. Charlotte-Mecklenberg Board of Education,[30] the Court ordered extensive busing to integrate the public schools in a largely urban area; and it generally placed a heavy burden of proof on formerly de jure segregated school districts to demonstrate that remaining racially-identifiable schools were "genuinely nondiscriminatory."

President Nixon responded to Alexander and Swann by announcing that he had:

> "instructed the attorney general and the secretary of Health, Education and Welfare that they are to work with individual school districts to hold busing to the minimum required by law."[31]

The President also said that the Administration was submitting an amendment to the pending ESAA bill to "expressly prohibit the expenditure of any of those funds for busing."[32]

Despite the judicial pressures, the administration's policies did dramatically curtain OCR's activities. Although 600 administrative proceedings had been initiated between 1964 and 1970 -- an average of 100 enforcement actions per year -- from March 1970 until February 1971, no new proceedings whatsoever were commenced; and whereas 44 districts had been subjected to fund terminations in 1968-69, only 2 such terminations were undertaken in 1969-70 and none were initiated for the 3 years thereafter.[33]

This pattern of inaction led a group of civil rights attorneys to initiate an unusual law suit against HEW, charging that the Department had violated Title VI by abandoning on a wholesale basis any serious attempt to enforce the statute. In 1973, the United States District Court for the District of Columbia issued a decision in this case, Adams v. Richardson, upholding their claims. The court described in great detail the extensive pattern of non-enforcement. For example, in 1970-71, 113 school districts had reneged on prior approved desegregation plans and 74 of these were still out of compliance by 1973. OCR had commenced administrative proceedings against only 7, had referred 8 cases to the Justice Department and only in 3 had law suits been filed. In the area of higher education, 5 out of 10 states which had been requested to file desegregation plans totally ignored the request and the other 5 had filed unacceptable plans; nevertheless, 18-36 months later, no formal comments and no enforcement proceedings had been initiated by OCR.[34] Under these circumstances, the court held in blunt language that HEW had "no discretion to negate the purpose and intent of the statute by a policy... 'of benign neglect'".[35] The alleged defense of "voluntary compliance" was considered untenable in light of the purposes of the act.

The court then issued a detailed order requiring OCR within 60 days to commence administrative enforcement proceedings (or other mandatory compliance actions) against all districts that OCR had found out of compliance for the 1970-1971 school year. The agency was required to report to plaintiffs' counsel on its compliance with this directive and, for the next three years, OCR would have to submit semi-annual reports on its handling of new complaints.[36]

III. Origins of the Big City Review: 1972-74

The Nixon administration's main preoccupation in the civil rights field was with its promises to Southern states to slow the pace of school desegregation, and its commitment to limit the use of forced busing. The administration's posture, however, permitted new initiatives to be developed in the North, initiatives which in time would open major new avenues for civil rights enforcement. Ironically, therefore, this conservative Republican administration would come to be identified in the North with policies that were more result-oriented than any previously devised under the Democrats.

OCR's Civil Rights enforcement staff, ordered to moderate enforcement activities in the South, and to avoid the use of forced busing, naturally tended to turn its attention toward areas covered by Title VI which were not affected by these dictates. Discrimination against national origin minority children with limited English language proficiency was one such area. In May, 1970, OCR issued Title VI compliance guidelines requiring curricular opportunities to be made available to such children.[37] These guidelines were specifically upheld by the United States Supreme Court in Lau v. Nichols, its major bi-lingual education decision.[38]

A second area of growing OCR enforcement interest was that of "second generation" school desegregation problems which were arising in both the North and the South. These concerns focused on the more subtle patterns of discrimination against students within schools that purportedly has been desegregated. For example, in 1971, it was reported that in a Mississippi school district:

> "Visible control of the schools is still white; during the past two years, more than half of all black administrators were fired, demoted, or placed in tangential positions. . .
>
> Inside the schools. . .[is] a new kind of documentation for minor disciplinary incidents

> . . .hundreds of black children have been expelled or suspended. . .
>
> Over forty percent of black school children attend segregated classes. . ."[39]

In addition to these new enforcement areas it was developing under Title VI, OCR was also undertaking additional enforcement responsibilities required by other new civil rights statutes, specifically Title IX of the Education Amendments of 1972 which prohibited sex discrimination in federally assisted educational programs and the Rehabilitation Act of 1973 which prohibited discrimination in such programs against the handicapped.[40]

In short, OCR's new concentration on bi-lingual education issues, second generation race discrimination problems, sex discrimination, and rights of the handicapped, intensified by the pressures from the Adams court to take forceful action, provided the ingredients for a new OCR enforcement agenda. Investigation of these issues in Northern school districts where busing would not be a factor was, under the Nixon administration, the most politically viable direction. As a result of this shift in focus, it could be said that "[b]y the mid-1970's its [OCR's] principal civil rights goal was to make separate institutions more nearly equal."[41] and, at that time, barely 3% of staff time was being spent working on classic school desegretation problems.[42]

In 1972, Martin Gerry, Assistant Director of the Office for Civil Rights, was in a unique position to translate these trends into a new concrete enforcement model. He had dealt with second generation segregation in the South and with discrimination against Mexican-American children in the Southwest. Perhaps most importantly, he had directed OCR's first major investigation of a Northern city since the 1965 Chicago debacle -- its review of in-school racial discrimination in Boston. This civil rights foray into the Kennedy family's backyard not only provided valuable political experience, but it also enhanced his political credentials with the Nixon administration.

Gerry began to think big. He started to develop an investigative model that could be used, with suitable adaptations, in any of the major cities. The rationale for this project had four main elements. First, and most simply, about 17% of all the elementary and secondary black school children in the country were in the five city school systems originally targeted for these reviews,[43] but OCR was using far less than a proportionate share of its investigative resources to insure that federal funds were not being given to programs that denied these children equal educational opportunity.[44]

Second, based on his investigative experience, Gerry assumed that major problems of in-school segregation and discrimination would be uncovered in any large city, and he believed that it was time for OCR to take a bigger role in addressing these more subtle forms of discrimination.

Third, Gerry had certain ideas about the discovery and use of facts. An investigation of a large urban school system should be done comprehensively or it should not be done at all; in order to be comprehensive, automatic data management techniques had been utilized. The mere act of uncovering and proving discriminatory patterns set in motion processes that would force large school districts to become more accountable to minority constituencies.[45]

Fourth, and least explicit (but perhaps most important) was the political element. The Administration's Southern strategy, as well as the Stennis-Ribicoff bills, created a political climate favorable to increasing civil rights enforcement in the North. At the same time, President Nixon's thinly veiled threat (in August, 1971) against any federal official who advocated busing remedies made clear that OCR could accomplish little in the way of inter-school desegregation in big cities. Somehow, a Northern strategy had to be developed which would press for equal educational opportunity but without busing or forced integration.

Through an interesting combination of events, the issue of discrimination against language-minority children became the catalyst for Gerry's creation of a new investigative model. In the Summer of 1971, a year after OCR had issued its bi-lingual education guidelines, the United States Commission on Civil Rights had conducted a study of the Puerto Rican population in New York City, focusing in particular on educational opportunities. As a result of the Commission's findings, its Chairman, Father Theodore Hesburgh, requested HEW to investigate the denial of adequate educational services to Hispanic children. Senator Jacob Javits (R. N.Y.) made a similar request, broadening it, however, to ask for consideration of opportunities for all minority children.[46] Coincidentally, during this same period, President Nixon's 1972 campaign committtee had embarked on a strategy to win the allegiance of Spanish-speaking Americans.[47]

Gerry convinced OCR Director Stanley Pottinger to respond affirmatively to these requests. Thus, in the summer preceding the 1972 elections, OCR initiated a "national origin review" focusing on the situation of New York City's 300,000 Hispanic children. By August, 1972, Gerry was in a position to broaden the investigation to consider all pending complaints against the Board of Education including Title IX violations and other types of Title VI violations. He so notified Chancellor Scribner.[48] By 1973, Gerry had created a task force of staff and special assistants in his Washington office to help create all-inclusive investigative model. Now all the elements were on line to turn the New York investigation into a pilot project for even broader undertakings.

Thus, in 1973, the New York review was maturing into the general concept of what was to become known as the "Big Cities Reviews" (sometimes referred to as large scale "equal educational services (EES) reviews"), which was to encompass not only New York, but also Chicago, Los Angeles and Philadelphia. The broad issues to be comprehensively and systematically analyzed under this model were set forth in the "Issues Outline,"[49] a 172 page typewritten document which set out more than a hundred questions about education programs in New York. The paper was divided into the following four areas:

1. Comparability of allocation of educational resources among different racial and ethnic school populations.[50]
2. Inappropriate educational environments for racial, ethnic and language minority children;[51]
3. Assignment of children to segregatory and educationally inappropriate classrooms and instructional groupings;[52]
4. Discrimination in non-instructional programs, extra-curricular activities and discipline practices.[53]

By 1975, OCR Director Peter Holmes was heralding the New York Review (and reviews planned for Chicago, Los Angeles, Philadelphia and Houston)[54] as an innovative civil rights enforcement project.[55] Thirty OCR staffers were assigned to the New York Review, in addition to six employees of contracting firms hired by OCR who were working full-time on the project. Over $1 million already was committed to purchase sophisticated computer and data processing services and to support the design and implementation of an investigative model applicable to all big cities. Even if OCR's analyses ultimately showed that discrimination had not occurred in New York, he said, this expenditure of resources would be productive because:

> "OCR will have developed a whole new complement of skills. . .[and] the fund of knowledge we acquire with respect to procedures and investigative techniques applicable to large city systems can become a valuable source of information to private civil rights organizations."[56]

According to Holmes, these capabilities were important because compulsory metropolitan-wide desegregation on a massive scale simply was "not in the cards" and therefore the most OCR could do on behalf of the large numbers of minority children who lived in big cities was to focus on educationally harmful discrimination within the schools.

These intra-school segregation issues upon which the Big City Reviews were to focus, were "second generation" issues for Southern school districts which had dismantled their *de jure* dual school systems. In the Northern cities, however, neither the courts nor OCR had dealt with fundamental problems of segregation in school assignment. (Such first generation issues were still the priority concerns of most civil rights advocates in the North who were pressing for integration regardless of whether existing segregation resulted from *de jure* or *de facto* causes.[57]) The Big City

Review strategy may have been politically ingenious in pressing a major civil rights enforcement thrust against the Democratic-controlled urban centers, without raising spectres of forced integration and busing that would rankle the Republican ranks wherever applied. But it also had an inherent flaw which was to plague OCR's efforts throughout the reviews: without a prior finding of intentional segregation of students, both the school district officials being charged with violations and general public opinion had difficulty accepting the legitimacy of OCR's allegations.[58]

In short, then, the Big City Reviews opened up new directions for civil rights enforcement in terms of geographical locale, issue focus and methodological approach. In New York, the massive investigation initially scheduled to last three years would stretch to five, and eventually it would produce two detailed sets of findings alleging pervasive discrimination by the New York City school system, as well as two consequent agreements between OCR and the Board which sought to resolve the issues. However, a decade after the Hesburgh/Javits requests, the results of the investigation was still unclear, as full compliance with the agreements had not been achieved and the continuation in effect of the employment agreement had become the subject of controversial political interventions and litigation.59.

The detailed story of the New York Review, which is the main subject of this case study, will be told in the next two chapters. Its broader implications for American egalitarian ideology, for implementation of civil rights laws, and for comparative institutional perspectives will then be analyzed in Part Three.

1 G. Orfield, *Reconstruction of Southern Education* 23 (1969) (hereinafter "Reconstruction").

2 42 U.S.C. §2000d-1.

3 *Reconstruction*, *supra* n. 1, at 52.

4 29 Fed. Reg. 16298, 16300 (1964) (codified at 45 C.F.R. Part 80).

5 *See* discussion in Ch. 4, p. *supra*.

6 *See* H.R. Rodgers and C.R. Bullock, *Coercion to Compliance* (1976).

7 B. Radin, *Implementation, Change and the Federal Bureaucracy. School Desegregation Policy in HEW, 1964-68*, 104 (1977).

8 *Id*. at 105.

9 *Id*.

10 30 Fed. Reg. 9981 (1965) (codified at 45 C.F.R. §181.5(b)(1).

11 Maintenance of segregated faculties had been one of the major techniques for impeding successful operation of freedom of choice plans. In the absence of meaningful faculty integration, certain schools remained identified as "black schools" while others were known as the "white schools". Although parents theoretically could choose to cross these implicit color lines, few were likely to do so; the absence of black faculty as both role models and support figures made it even more unlikely that black parents would choose to send their children to white schools.

12 *Reconstruction*, *supra* n. 1, at 106.

13 *See* *Reconstruction*, *supra* n. 1, at 151-207; Center for National Policy Review, *Justice Delayed and Denied* 7-9 (1974). The account of these events of Joseph Califano, Secretary of HEW, in the Carter Administration, includes a statement by President Johnson to Pope Paul VI, with whom he was meeting on the day these developments broke, that "One of

my own Cabinet members wants to stop funds for poor children in one of our largest cities, run by a fine Catholic mayor. But, we'll help those children." J. Califano, Governing America: An Insider's Report from the White House and the Cabinet 222 (1981).

After the Chicago episode, Illinois Senator Dirksen sponsored an amendment to Title VI prohibiting deferral of new program funds unless a timely administrative hearing is held and findings made on the record. See 42 U.S.C. §2000d-5, Cf. pp. 101-103, supra.

14 Until Martin Gerry turned OCR's attention to the Big City Reviews, no sustained efforts were made by the Department of HEW to develop test cases and precedents for challenging Northern patterns of discrimination under Title VI. OCR responded to re-iterated Congressional pressures for "Uniform" enforcement by targeting small suburban school districts like Ferndale, MI and Union Township, NJ which did not have the resources to play political trump cards. Even after Congress had passed the Green amendment to ESEA, which required uniform application of HEW guidelines and regulations throughout the country (Pub. L. No. 90-247, §2, 81 Stat. 783 (1968) repealed, Pub. L. No. 91-2 30, Title IV, §401(e)(1), 84 Stat. 173 (1970) (current version at 20 USC 1232(c)). OCR looked only to moderate size districts. Just before the 1968 elections, in response to a further amendment to an appropriation bill (Pub. L. No. 90-557, §410, 82 Stat. 995 (1968) requiring HEW to equalize its investigative staffs in the North and South, regional offices of OCR were opened in New York, Chicago, Boston and San Francisco.

15 By January, 1966, OCR had a professional staff of 50, which oversaw a docket including 65 enforcement proceedings, 1,900 voluntary desegregation plans, 27,000 assurances of compliance and 164 court orders. (E. Mosher and S. Bailey, E.S.E.A.: The Office of Education Administers a Law 154 (1968).

16 "Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964", 45 C.F.R. Part 181 (1966).

17 45 C.F.R. §181.13(d) (1966).

18 For example, §181.54 provided that:

> "If a significant percentage of the students, such as 8 percent or 9 percent, transferred from segregated schools for the 1965-66 school year, total transfers in the order of at least twice that percentage would normally be expected [for the 1966-67 school year]."

19 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967).

20 *See, e.g.*, lower Court decision overruled in *Taylor* v. *Cohen*, 405 F.2d 277 (4th Cir. 1968).

21 372 F.2d at 848.

22 *Id.* at 852. The interplay between OCR and the Fifth Circuit in the development of Title VI compliance standards in the mid-60's is itself worthy of note. The Fourth Circuit (covering the states of Maryland, North Carolina, South Carolina, Virginia and West Virginia) and the Fifth Circuit (covering Alabama, Florida, Georgia, Louisiana, Mississippi and Texas and the Canal Zone) were the main federal appellate courts on the desegregation firing line in the post *Brown* era. The decisions of the Fifth Circuit tended to be more liberal than those of the Fourth. OCR relied on these Fifth Circuit precedents in formulating the broad standards in its various guidelines. Validation of the guidelines by the Fifth Circuit in *Jefferson County* could, therefore, be seen as a final step completing the circle of inter-related Title VI policy making by the Fifth Circuit and the Office for Civil Rights. *See* B. Radin, *supra* n. 7, at 117-118.

23 Pub. L. No. 90-247, §2, 81 Stat. 783 (1968). *See* Ch. 4, n. 20.

24 "Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964," 33 Fed. Reg. 4955 (1968). For example, the regulations prohibited inequities in resource allocation, in the provision of student services such as guidance and counseling, and in the assignment of staff to minority schools.

[25] *Id*. §10.

[26] *Id*. §11.

[27] Radin, *supra* n. 7, at 14.

[28] [Footnote omitted] Rabkin, "Office for Civil Rights", in *The Politics of Regulation* 338 (J. Wilson, ed. 1980).

[29] 396 U.S. 19 (1969).

[30] 402 U.S. 1 (1971).

[31] New York Times, Aug. 4, 1971, p. 15, col. 1, quoted in D. Kirp and M. Yudof, *Educational Policy and the Law* 394 (1974 ed.).

[32] *Id*. President Nixon's announcement came on the very day that OCR Director J. Stanley Pottinger had published an article indicating that OCR expected to act more aggressively in light of *Swann* and *Alexander*. Pottinger described OCR's systematic efforts to define, identify and eliminate racially-identifiable schools in the South. *Swann*, he said, had made clear that "non-contiguous zoning or the additional transportation typically resulting from it. . .are legitimate tools, and. . .must be used if necessary to disestablish the dual system." Pottinger, "HEW Enforcement of *Swann*," 9 Inequality in Educ. 6, 9 (1971). Although Pottinger advocated a balanced and practical assessment of desegregation plans so as to avoid "excess" busing, he concluded that transportation should not be regarded as illegitimate "simply as a method of avoiding the constitutional duty to eliminate racially-identifiable schools." *Id*. at 10.

[33] Findings of the court in *Adams* v. *Richardson*, 351 F. Supp. 636, 640 (D.D.C. 1973).

[34] 351 F. Supp. at 637-38.

[35] 351 F. Supp. at 642.

[36] *Adams* v. *Richardson*, 356 F. Supp. 92, 95-96 (D.D.C.), *aff'd. and modified en banc*, 480 F.2d 1159 (D.C. Cir. 1973). In upholding the general findings of the court below (but modifying the order in regard to the higher education issues) the Appeals Court emphatically rejected OCR's purported reliance on voluntary compliance in light of the admitted

effectiveness of fund termination proceedings in the past (480 F.2d at 1163, n. 4).

37 35 Fed. Reg. 11595 (1970). (The standards were set forth in a memorandum dated May 1970, but were not published in the Federal Register until the following July).

38 414 U.S. 563 (1974). The court found that San Francisco had violated Title VI by failing for provide language services for large numbers of non-English speaking children of Chinese ancestry.

39 Barber, "Swann Song from the Delta," 9 Inequality in Educ 4, 4-5 (1971).

40 Commencement of significant enforcement activities in both of these areas was postponed because of delays by HEW in promulgating specific enforcement regulations.

41 G. Orfield, Must We Bus? 281 (1978).

42 *Id.* at 315.

43 Holmes, "The Role of the U.S. Department of Health Education and Welfare" 19 How. L.J. 51, 61 (1975).

44 Gerry Interview.

45 While it may be possible to achieve substantial compliance in a small district by ordering a specific remedy, Gerry's belief has been that in a large district, "you can only talk about a process as a remedy, and the major element of that process would have been accountability and fairly close information collection." Gerry Interview.

46 Sen. Javits' request most likely was influenced by the Commission's findings, requests from constituents, and his long standing support of civil rights legislation. His request came in the final phases of the two year debate over ESAA legislation which, as noted in Ch. 3, acquainted him with the problems of second generation discrimination.

47 G. Orfield, Must We Bus? 301 (1978).

48 Letter dated August 8, 1972, from Martin Gerry to Chancellor Harvey Scribner.

49 "Issue Areas to be Reviewed During Initial Phase of the Equal Educational Services Review of New York City Public Schools and Other Federally Assisted Programs: 1973-1974" (unpublished looseleaf working paper).

50 The comparability section of the outline was 88 pages long. Besides tracing local and state funds, OCR planned to look in detail at instructional expenditures, the existence and condition of physical facilities, quantity and quality of equipment and materials (20 categories), allocation of special instructional services (29 categories), and many other items. The following is a representative instruction for the data analysis:

> "3. Determine for high schools...whether a statistically significant correlation exists between the racial/ethnic composition of a school and (1) the per-pupil instructional expenditure, utilizing all instructional salaries; (2) the per-pupil instructional expenditure utilizing only full-time teacher salaries...
>
> "4. For each definition of average per-pupil instructional expenditure, when a statistically significant correlation exists between high schools within the city, prepare an analysis showing the racial/ethnic composition, average per-pupil instructional expenditure (as per relevant definition), and deviation (quantified) from city average for each school." (Issues outline at 3).

51 This category was meant to address the quality of services and the compatibility of learning environments to the cultural, linguistic and educational needs of minority children. It attempted to relate broad (and often controversial) theories of learning, such as the Cardenas Theory of Incompatibilities, to numerous specific issues about how curriculum, textbook use, achievement levels, testing devices, etc. affected minorities. For example:

> "4. Determine whether a statistically significant difference exists in the relative gain in raw score, grade equivalent and percentile rank (based on pre-test and post-test comparison) for students on the basis of race, ethnic group and primary language in [selected

grades and classes]." (Issues outline at 117).

52 Assignment and grouping for instruction cut across a number of unsettled educational policy issues, such as the validity of using standardized tests or assessment criteria to group children for instruction. For example:

> "3. Determine for each elementary school whether a significantly higher percentage of racial/ethnic minority children (as compared to non-minority children) are assigned to ability groups (i) without specified achievement test scores relevant to such placement, (ii) with test scores inappropriate for such placement." (Issues outline at 125).

53 The concern in this area was whether inconsistent discrimination or vague criteria were used to make non-instructional services (*e.g.*, social work, psychological counseling) or extra-curricular activities (*e.g.*, athletics, drama, social) available to minority children. Similarly, it posed a detailed set of questions about the procedures, practices and statistical patterns regarding exclusion of children from services (*i.e.*, suspension, expulsion).

54 Houston later was dropped from the Big City Reviews.

55 Holmes, *supra* n. 43, at 58-61.

56 *Id*. at 60.

57 Many civil rights leaders rejected OCR's rationale for the Big Cities Reviews. On December 10, 1975, a coalition of 57 civil rights and civic organizations sent HEW Secretary Mathews a letter condemning what it called "the persistent and continuing failure of [HEW] to protect the rights of racial and ethnic minority groups, women, and handicapped persons." One of nine "serious deficiencies" cited in the letter was:

> "The decision to divert a large portion of resources into four massive, computerized, but overly broad investigations of big city school systems whose results, if any, will be years in coming."

Essentially, the civil rights groups saw the Big Cities Reviews as an excuse to siphon off huge amounts of resources from complaint investigation into inconclusive studies. For example, with "[v]irtually the entire New York Regional Office education staff" working on the Review for years at a time, other school districts and other subject areas could not be serviced. The signatory organizations advocated instead "carefully targeted reviews in selected areas" and "clear national compliance policies in all areas where discriminatory practices occur, and consistent enforcement in a number of districts regardless of size. Letter to David Mathews, from American Association of University Professors, Committee on Women, et. al., dated December 10, 1975. Attached to the letter was a memorandum entitled "Inadequacies in the HEW Anti-discrimination Enforcement Program".

58 A prominent OCR official articulated the troublesome philosophical irony of Gerry's approach. "It really was a return to Plessy -- if blacks could get equal services in their separate locations, that would be fine." Wilson Interview.

59 In June, 1982, the Department of Education let it be known that it was prepared to declare New York in non-compliance with the essential provisions of the first agreement, but it withheld this finding for further consideration after Senator Alphonse D'Amato (R. N.Y.) publicly interjected himself into the dispute on behalf of the Board. New York Times, June 10, 1982, p. 1, col. 1. Five months later, the Senator announced that the federal government had negotiated a new agreement totally replacing the original one. It was immediately apparent (see, e.g., New York Times, November 24, 1982, p. A1, col. 1; November 28, 1982, p. 6E, col. 6; December 8, 1982, p. A30, col. 1 (editorial)) that the new 1982 agreement basically freed the Board from any further substantial compliance efforts in the areas covered by the 1977 agreement. However, even before these political events took place, a group of minority parents had reactivated a federal lawsuit that requested an injunction ordering the Board to implement the 1977 agreement. See New York Association of Black Educators II v. United States Department of Education, No. 77 C. 2531 (E.D.N.Y.). The effect of the 1982 agreement on the litigation is yet to be determined.

PART II

THE STORY

(The New York City Review, 1972-1982)

Our case study of the New York City Review will be sented in two parts. Chapter Six will provide an account of the intense debates and negotiations among OCR, the New York City Board of Education, and various unions, politicians and advocacy groups, over the causes, consequences and remedies for segregatory faculty assignment patterns and under-representation of minorities personnel in teaching positions. These are the events that drove a number of school principals to go to the brink of imprisonment rather than release ethnic data to OCR; that spurred Senator Moynihan to denounce the final OCR-Board of Education agreement on the Senate floor with allusions to Nazi Germany; and that caused local civil advocates to declare that behind New York City's declarations of integrationist ideals lay ingrained patterns of institutionalized racism.

The story begins by looking at the setting for the New York Review from the personal perspectives of its five key participants. Next, we describe briefly the sudden emergence of the employment issues as the dominant focus of a compliance review which, as indicated in Chapter 5, had originally been developed to emphasize resource allocation and student service problems. The balance of Chapter Six is concerned with the climactic employment negotiations, the substance of the resulting agreement and the controversial process of attempting to implement it.

In Chapter 7, the study returns to the initial student services issues, which had been deferred by OCR in favor of the employment issues but eventually became the subject of an analogous sequence of negotiation, agreement, and compliance problems.

CHAPTER SIX: THE NEW YORK REVIEW: FACULTY HIRING AND ASSIGNMENT ISSUES

I. AN OVERVIEW: THE PEOPLE AND THEIR POLITICS

Dozens of people played important roles in the New York City Review, but five of them stand out: Martin Gerry, David Tatel; J. Harold Flannery, Irving Anker and Bernard Gifford. They are notable not only because of what they did, but also because they represent a spectrum of viewpoints about the condition of minority students and staff in northern urban school systems and about the appropriate federal civil rights enforcement role.

Martin Gerry

"The Review was Martin Gerry's baby," a high OCR official told one of the authors early in this study, and the comment became a familiar refrain throughout the interviews.

In 1967, Gerry graduated Stanford Law School and went to work for Richard Nixon's Wall Street law firm.[1] In 1969, he moved to OCR, where he worked as an executive assistant to the Director, Leon Panetta, a liberal Republican. When President Nixon fired Panetta for refusing to slow down civil rights enforcement,[2] Gerry remained. He carried out OCR investigations in the South and Southwest, becoming particularly involved in the problems of intra-school discrimination against Hispanic children. He also took charge of OCR's compliance effort in Boston, which laid much of the groundwork for the later Boston school desegregation litigation.[3]

From 1972, until he left the agency in January 1977, Gerry took personal control of the New York City Review. Despite his other duties over these years as Assistant, Deputy, Acting Director, and ultimately as Director, he "ran the investigation from Washington." OCR's local office in New York (Region II) was circumvented. In fact, Gerry rented office space for his Washington task force in the World Trade Center, which towers over Region II's offices a quarter mile away.

Gerry's leadership of this project was aggressive, enthusiastic and -- to many of the people with whom he dealt -- infectious. A New York civil rights activist, recalling a 1973 meeting Gerry organized with New York civil rights groups to build local support for his plans, said that it was a tremendous morale booster to have someone come down from Washington with so many ideas and, most important, with promises of substantial investigative resources. The school officials he accused of discrimination, of course, were less appreciative. Years after the fact they characterized Gerry as having been overbearing and publicity-seeking.

Gerry's personal style went hand in hand with his express theories about the role of the Office for Civil

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Rights. He thought of himself as a prosecutor. The New York City Board of Education, from this perspective, represented the forces of deeply engrained institutionalized discrimination against minority group children. He was particularly impatient with Board officials' liberal self-images -- he was more struck with what he perceived as the many unrecognized similarities between New York and, say, Charlotte, North Carolina, than with the much touted differences. For example, he noted that ability grouping practices used by many southern school districts to resegregate *within* schools after the courts had forced them to dismantle their dual school systems were based on testing and institutional grouping practices that had been developed in the North.

People often did not know what to make of Martin Gerry. Was this young lawyer from Nixon's law firm really a maverick in the Administration, one with the political skills to maneuver a major enforcement project to a successful conclusion? Or was Gerry's New York Review -- even assuming the best of personal intentions -- going to become a Trojan Horse? Would it hasten the collapse of OCR from within by misdirecting millions of dollars needed for individual complaint investigation and other pressing needs?

David Tatel

David Tatel came to the OCR directorship in May 1977, as an attorney with impeccable civil rights credentials and with close associations with organizations that had been fighting OCR's recalcitrant enforcement pace during the Nixon-Ford years. (These groups had won the court decisions, discussed in Chapter Five, which held that OCR had violated the civil rights statutes through its inadequate enforcement efforts.)[4]

While respectful of his predecessor's motives and personal talents, Tatel saw the New York Review as a misallocation of resources. OCR was expending all of its efforts on two activities -- complaint processing and the Big City Reviews -- but there was little to show on either account. The complaint backlog had piled up to 2500. And the Big City Reviews appeared to be indiscriminate and extremely expensive. The investigative model was like a "vacuum cleaner" -- around the country investigators were collecting incredible amounts of data without, in many instances, a good idea of what they were looking for and how to set priorities. The data was being fed into an expensive computer system. The investigators didn't understand, for example, the difference between issue areas where a statistical case could hold up in court and ones where it could not.[5]

Tatel's plan was to set up efficient administrative structures that would eliminate the complaint backlog and to trim back on the big city reviews. These reforms would free up resources for special compliance reviews selected on the basis of Tatel's own issue priorities. He was particularly interested in developing reviews that would lead to metropolitan desegregation -- a goal that the previous Republican administration had prohibited the agency from undertaking. (Tatel's initiatives in this area later came to be were hampered by anti-busing legislation).

Although Tatel wanted to devote the energies of his first year in office to the nuts and bolts tasks of building an efficient national organization, the New York City Review demanded immediate attention. The City's applications for approximately $17.5 million in federal desegregation assistance could not be approved unless Gerry's two sets of findings about violations of Title VI were resolved. Before Tatel took office, Acting Director Hamlin had withdrawn Gerry's second letter for further investigation on the grounds that its conclusions were not adequately supported by the cited data and legal argument. Local advocacy groups promptly attacked the withdrawal as a political sell-out and demanded reassurance that the allegations of discrimination would be dealt with on the merits, and quickly. Tatel, however, agreed with Hamlin's assessment and allowed the revision of these findings to be postponed. But he pressed ahead quickly on attempting to resolve the issues raised by Gerry's first set of findings. While maintaining a personal presence for high level policy decisions and critical stages of the negotiations, Tatel hired Nick Flannery to be the chief negotiator with the Board. Flannery quickly got to work and an agreement was concluded over the summer.

Under Tatel, there was a shift of tone in the OCR's relationship with the Board. A demanding and capable administrator and an able advocate, Tatel also had a conciliatory attitude. He approached the school officials as someone willing to give the benefit of the doubt to their motives. He wanted to create an atmosphere where OCR's obligation to help districts solve their civil rights problems could actually become a practical and constructive process.

The transition from Gerry to Tatel turned the review into a hybrid. Gerry conceived and partially executed it as a model of tough urban civil rights enforcement. Tatel saw it as a departure from a sound application of OCR's institutional capabilities, and sought to complete it on a conciliatory note. In short, Tatel would not have started the Review the way Gerry did; Gerry would not have ended it the way Tatel did.

Nick Flannery

OCR brought in J. Harold ("Nick") Flannery, as an outside consultant, to help the agency's career officials and new political appointees reassess Gerry's work product. Initially, Acting Director Hamlin called on Flannery to determine whether the evidence Gerry had marshalled in support of his allegations of civil rights violations in New York could stand up in a vigorous adversary proceeding. Later, Tatel retained Flannery to carry out the negotiations

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with the Board.

Flannery was one of the nation's premier civil rights litigators. He had served for twelve years in the Civil Rights Division of the Justice Department, and for five years in public interest organizations (including a period as Tatel's successor as national director of the Lawyers' Committee for Civil Rights Under Law) before joining a prominent Boston law firm. This career included a three year stint as principal trial counsel in the Boston desegregation case.

Flannery was not eager to take on the OCR project. Consistent with his background as a trial lawyer, he thought that administrative civil rights enforcement was generally inferior to judicial enforcement, particularly when an agency like OCR ran up against a politically powerful or "ultimately intransigent" school district. He contrasted this approach with the way the Justice Department (which, of course, did not deal in nearly the volume of cases that OCR did) would overwhelm its opposition with an exhaustively prepared, well-targeted case. Together, Tatel and Flannery reshaped the Review to look more like one of these iron-clad court cases. They honed in on the strongest parts of the two Gerry letters, and dropped a number of weaker findings. Rather than putting the Board on the defensive on every issue where OCR had reasonable suspicions, they wanted to avoid pressing any charges to which the Board might make a rebuttal that would hurt OCR's credibility.

Flannery is remembered by the Board's representatives as a trustworthy and extremely skillful negotiator. Flannery, for his part, concluded that New York school officials (unlike their counterparts in Boston) were sufficiently sensitive to racial issues and were competent enough as administrators to permit a significant degree of voluntary compliance. He therefore attached a high priority to establishing an atmosphere of mutual respect between the parties. To further this end, he took the chance of accepting oral assurances on an important matter early in the negotiations when the Board's representatives said it was impossible to make the statement in a public document. He hoped that if viable personal and professional relationships were established during the bargaining phase, they would lay the ground work for successful compliance with the final agreement.

But Flannery's original misgivings about the administrative enforcement process continued during and after the negotiations. For example, he assessed the first agreement as "respectable," from OCR's point of view, but "only at its best." "If there is any slippage," he warned his colleagues, "it will go from the defensible to the indefensible in a fortnight."

Irving Anker

From the early stages of the Review until the signing of the second agreement, the Board of Education's chief executive was Chancellor Irving Anker.[6] Anker's experience and beliefs embodied the school systen he administered. Over more than 25 years, he had worked his way up the ranks of the meritocracy -- high school teacher, department chairman, principal, assistant superintendent, deputy chancellor and chancellor. He was proud that he had tried to organize a new integrated high school in the mid-1950's; he was proud of the Board's positive record of good intentions regarding integration as proved by his reading of the decision in the Andrew Jackson case[7]; and he was proud that he lived in an integrated neighborhood and had sent his children to integrated public high schools.

Anker acknowledged that some of OCR's allegations did reveal unfortunate problems in the system, and that others, although finally rebuttable, at least deserved an explanation. (The balance of the charges, however, he believed to be totally unwarranted.) But he insisted that the origins of these real or apparent problems were "innocent." The school system was the victim of societal failings --housing discrimination, income inequalities, widespread prejudices, etc. He said:

> "It is one thing to say this is a phenomenon in society we should try to change. It is another thing to say that where we find this phenomenon reflected in the schools, this is an example of discrimination practiced by the schools."[8]

By failing to take these sociological realities into account, Anker reasoned, OCR's policies were shortsighted. Establishing hiring quotas, eliminating ability grouping, prohibiting black communities from accepting a disproportionate share of the system's black professionals, or undoing the imperfect but workable political compromises behind New York's system for teacher selection in the decentralized community school districts were "reforms" which would merely undermine the school system's public support. Then, white flight would limit any possibilities for real integration and there would be fewer resources available for quality education.

Anker's basically good intentions created for Tatel and Flannery a possible basis for arriving at a meaningful agreement. But for Martin Gerry, Anker's understanding of the way the school system functioned typified a basic noncomprehension of institutionalized racism. "I wanted to force knowledge," recalls Gerry. "When Irving Anker said he had not known that there were 4,000 racially isolated classes in his school system, I believed him. But why didn't he know that already?"

Bernard Gifford

Anker's Deputy (from December 1973 to August 1977) was Bernard Gifford, a young black intellectual with a doctorate in biophysics and a rapidly growing expertise in policy analysis and program evaluation. Gifford was the proverbial man in the middle. On the one hand, Anker and Gifford shared both a mutual respect and a set of fundamental values. They believed in integrated schools, rewards for individual merit, and equal opportunity without quotas. On the other hand, they could not always agree on how these general values applied to the reality of New York's school system on such issues as whether racial bias (including unconscious stereotypes) permeated decision-making by New York school officials. Also, Anker objected to OCR's investigation, whereas Gifford welcomed it.

OCR's intervention fit neatly into Gifford's vision of school system reform. Even before the 1975 fiscal crisis disrupted politics-as-usual in New York, Gifford thought that it was desirable and possible to establish a new, progressive coalition of educational interest groups and politicians. He needed at least two things to promote this change --leverage and data. First, he needed an organization with the financial or legal power to change the system of rewards and punishments affecting the school system. Second, it was important to have a comprehensive, unimpeachable and up-to-date investigative report documenting pervasive discrimination against minority group children and educators. OCR could provide both.

Not surprisingly, therefore, OCR's information requests to Gifford led to an on-going cooperative relationship. Gifford helped OCR and its consultants understand the workings of the New York schools, and he critiqued some of the hypotheses and methodologies. OCR authorized its consultants to perform computer runs testing out some of Gifford's ideas.

The complexities of the Anker-Gifford-OCR relationship came to the fore, however, when OCR issued its first letter of findings of non-compliance. Anker asked Gifford to prepare an analysis of the findings for consideration by the Board of Education. Gifford apparently approached this task with the assumption that OCR had reached mostly the right conclusions, but, in some areas, for the wrong reasons. Working feverishly for three months, he and his staff attempted to outdo OCR. They produced the "Gifford Report," a far-ranging document which went beyond OCR in concluding that, but for discrimination, the New York teacher corps would have been 22% minority in 1972 rather than 11.2%. Also, the report challenged the widely held belief among Board officials that racial assignment patterns were solely the result of New York's school Decentralization Law. It even included a detailed legal analysis section which generally upheld OCR's interpretations of the applicability of Southern school desegregation precedents to New York.

Several members of the Board of Education were very displeased with the Gifford Report. Consequently, Anker removed Gifford from the OCR matter and put his counsel, Michael Rosen, in charge of drafting a reply to OCR that would deny fully any legal liability. Anker then gave his diplomatic Senior Assistant, Dr. Charles Schonhaut, overall responsibility for conducting the negotiations with OCR. Gifford's internal report was publicized in the press before the Board formally replied to OCR --with special emphasis on Gifford's conclusions that New York appeared to employ half the number of minority teachers as could have been expected. His report was also used against the Board by OCR negotiators at the bargaining table, and by OCR and civil rights groups in later court cases. By this stage, however, although his work product continued to influence events, Gifford's official involvement with the OCR Review was ended.

II. THE INVESTIGATION

A. Setting The Agenda: The Emergence of the Employment Discrimination Issues

Although the New York City Review had been organized to focus on four specific student services issue areas, two years after the data-gathering had commenced, a new issue came to the fore -- an issue which was ultimately to dominate the entire process. This was the question of discrimination in teacher hiring, a highly charged, difficult problem that Martin Gerry had considered but had consciously omitted form his core issue areas at the time of the project's initiation.

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For civil rights advocates in the late 1960's and early 1970's the most critical educational issue in New York was discrimination against minority educators in basic hiring policies and practices. In 1970, fewer than 1% of the principals and assistant principals in the system were black or Hispanic; for teachers, the figure was about 9%. By contrast, the student population was predominantly minority. Over the years, numerous studies and commission reports had concluded that many minority applicants were being unfairly excluded from the school system by the licensing examinations given by the New York City Board of Examiners, a semi-autonomous agency established by state law.[9] It was widely believed -- and later established in court -- that the passing rate for blacks and Hispanics on these tests was lower than for whites.

In 1970, a federal lawsuit, Chance v. Board of Examiners,[10] was brought to challenge the tests for supervisors and administrators. In 1974, an analogous suit, Rubinos v. Board of Examiners[11] challenged the teacher examinations. The Chance plaintiffs won a preliminary injunction which led to a series of court mandates and consent decrees that radically changed the system for hiring supervisors in New York and dramatically increased the number of minority supervisors. The Rubinos case, however, was largely inactive, and no court orders were issued against the teacher exams.

In 1973, HEW had alleged illegal discrimination against minority teachers in notifying New York that it was ineligible for ESAA grants. The main basis for that finding was that teachers were assigned in a manner which made school faculties racially identifiable. These charges did not arouse much interest among local civil rights groups at the time. Their priority was discrimination in hiring: which school a teacher would be sent to after he was hired was of lesser concern. Moreover, many minority group leaders favored assigning black professionals to predominantly minority schools so that they would serve as "role models" for the children.

Gerry did not see much point in making an issue out of the distribution of the relatively few minority teachers in the City's schools. He also was unwilling, at first, to take on the activists' main target -- the Board of Examiners licensing system. The reason was political. He believed the EES Review would raise enough controversy without risking an immediate confrontation with the powerful United Federation of Teachers (UFT) headed by Albert Shanker. This judgment was reinforced, Gerry says, by a meeting he had with Shanker at the beginning of the EES Review -- "one of the most memorable meetings of my career." Shanker, he says, warned him that he would fight the OCR investigation "every step of the way."[12] Avoiding the main employment issues might at least temper the intensity of the union's

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resistance. Consequently, Gerry's Issues Outline[13] did not raise any questions about possible discrimination in the use of licensing tests.

However, OCR was forced to reconsider this position at the beginning of 1976, when two civil rights organizations independently filed class action administrative complaints with OCR charging the Board with employment discrimination. The complaints were a product of the New York City fiscal crisis, which had begun in fall of 1975. Thousands of teachers were being laid off. The complaints alleged that these lay-offs were affecting minority teachers disproportionately. For example, the complaint filed by the New York Civil Liberties Union, Cheese v. Board of Education, said that the lay-offs would reduce the proportion of minority teachers from 12% to 5%.[14] These lay-off problems could not, of course, be isolated from questions about tests and procedures that controlled access to the system in the first place.[15]

OCR received these major complaints just as it was close to reaching an agreement with the plaintiffs in the Adams and Brown cases on a consent order requiring OCR to process all complaints promptly.[16] Hence, a serious response could not be avoided. OCR met in Washington with the New York civil rights groups. Impressed by the importance of their allegations, OCR then reorganized the New York City Review. First, there would be an employment discrimination investigation covering (a) the hiring and lay-off issues raised by the complaints; (b) the assignment and comparability issues that had been included in the EES Review; and (c) questions about equality of treatment for female employees, which had become part of the EES Review (based on Title IX of the Education Amendments of 1972). The employment investigation was given top priority.[17] The second part of the Review would then concentrate on the original EES issues, excepting the employment-related EES issues (such as teacher assignment issues related to comparability of resources) which were included in the first stage.

The great irony of this dramatic shift in the scope of the New York Review was that, later, after several months of data-gathering and analysis, the Delta Corporation concluded that the complainants' allegations about the effects of the lay-offs on minority teachers were incorrect. In fact, after the massive lay-offs, minority teachers formed the same proportion of the teaching corps as they had previously. By the time the lay-offs allegations were discredited, however, OCR had immersed itself in the underlying employment issues.

B. The First Letter of Findings

On November 9, 1976, about nine months after reviewing the Cheese complaint, and a few days after Jimmy Carter had been elected President, Martin Gerry called a press conference in New York City and announced the issuance of OCR's letter of findings on the employment questions. One short paragraph in this 14-page letter exonerated the Board of the charges of discrimination in lay-offs. The bulk of the letter, however, alleged that the system's hiring process was "exclusionary," a problem that had been "exacerbated" by the lay-offs. Specifically, Gerry wrote that the school system had, on the basis of race and national origin:

> "denied minority teachers full access to employment opportunity through the use of racially discriminatory selection and testing procedures and through the use of racially identifiable employment pools in a manner that discriminatorily restricts the placement of minority teachers."[18]

In regard to discrimination in hiring, OCR focused on three components of the licensing examinations that allegedly excluded minority applicants. First was the basic fact that proportionately more minorities failed the exams, and, since the tests had not been validated satisfactorily, it could not be shown that failure on the test correlated with an inability to teach. Second, OCR held that the system of ranking those who passed in order of their test scores placed minorities at the bottom of the list in disproportionate numbers and that such fine grade point differences between applicants did not reflect actual differences in ability. Third, the requirement that the eligible list of those who passed an early examination must be "exhausted" before anyone on a later list could be offered a position was detrimental to minority applicants, who tended to be represented in larger numbers on the more recent lists.[19]

Besides these problems with the licensing lists, tions was the City's "two track" hiring system. The "first track" to employment was the regular Board of Examiners testing system. Those who passed were licensed, placed on a rank order eligible list, and appointed in order to vacancies as they arose anywhere in the system. The "second track", known as the "alternative" or "NTE" method, was created by the Decentralization Law. OCR's first letter described it as follows:

> "Under this method, persons may be selected either (1) by being taken out of rank order from the existing rank order lists or (2) by achieving a minimum score (as determined by the Chancellor) on the National Teachers Examination (NTE). This method does not require that preference be given by date of examination or score attained."

The second track did not allow a teacher to travel as far as did the first, however. The alternative appointments could only be to elementary and junior high schools in the lower 45th percentile of schools as they were ranked in order of the average reading performance of their pupils (the "45th percentile" schools). In other words, these teachers could not be appointed to any high schools or special purpose schools, nor could they be appointed to any of the top ranked elementary and secondary junior high schools (unless they were originally appointed and assigned through the alternative procedure and later transferred to a top ranked school). OCR found that a disproportionate number of minorities were being hired by the alternative method, and that the minority enrollment of the schools to which they were tracked was over 91%. In short, the alternative system tended to funnel minority teachers into minority schools.

With regard to the second basic employment issue, segregatory assignment patterns, Gerry said that the school system had, on the basis of race and national origin,

> "(2) assigned teachers, assistant principals, and principals in a manner that has created, confirmed and reinforced the racial and/or ethnic identifiability of the system's schools;"

Essentially, most of the minority teachers were concentrated in virtually all minority schools, and hardly any minority teachers were assigned to schools having a substantial proportion of non-minority students.[20]

Discriminatory teacher assignment patterns were also said to raise comparability problems. On the basis of race and national origin, Gerry said, the system had:

> "(3) assigned teachers with less experience, lower average salaries and fewer advanced degrees to schools which have higher percentages of minority students."

The factual basis for this finding was set forth in a single paragraph, the heart of which read like an excerpt from the original Issues Outline. It stated that there was:

> "...a significant correlation between the percentage of minority students and the average teacher experience [illegible] years, the average teacher salary, and the percent of teachers with advanced degrees.[21]

C. Reactions and Reponses

1. Interest Groups.

"Last Gasp of Lame-Duck Bureaucrats," was the headline of Albert Shanker's column in The New York Times[22] on the Sunday following Gerry's release of the First Letter. Shanker attacked Gerry's credibility both as a fact-finder and as an educational policy maker:

> "The Gerry report is both illogical and destructive, and it will bring even more chaos confusion and conflict to our schools -- which are still reeling from massive budget cuts."

He charged that Gerry had started with his conclusions and then gone out to find supporting facts.[23]

Shanker strongly defended the examination system, saying that OCR had produced no evidence that the Examiners' tests were not job related. Shanker acknowledged that "[t]here should be more minority group teachers and supervisors and more women in supervisory positions." But the way to do this was for the local interest groups to unite to get more money from the federal government so that additional hiring -- now frozen by the City's fiscal crisis -- could begin. The Republican OCR's threat to withhold money was an attempt to drive a wedge between the groups that had just united successfully to vote President Ford out of office.

The American Jewish Committee (AJC) also took a strong stand against OCR's findings. Stressing its support for integration and its opposition to racial quotas and "benign discrimination", AJC issued a report which raised serious questions about the legal basis for OCR's conclusions. It said that OCR's reliance on the Supreme Court ruling in Swann v. Charlotte-Mecklenberg Board of Education[24] was misplaced, because any racially disparate patterns in New York were caused by good faith educational experiments. They were not the result of purposeful or intentional school board action and, therefore, based on the Supreme Court's more recent holding in Washington v. Davis[25] that a plaintiff alleging denial of equal protection of the laws had to prove that disparate treatment was intentional, the situation in New York would withstand constitutional scrutiny.

Although opponents of OCR were the first to react, supporters also quickly mobilized. The Public Education Association (PEA) reacted to what it characterized as the "angry rejection by the Board of Education and teachers union" of the OCR findings. In a letter to the Board and Chancellor dated November 12, 1976, PEA criticized the school officials for seeming to reject out of hand the new federal mandate for reform after having said for years that they needed just such an intervention to be able to overcome political pressures that prevented them from reforming the hiring and assignment procedures.

About one month after the PEA's sharply worded challenge to the Board of Education, a coalition of eight civil rights and education advocacy groups[26] held a press conference in which they endorsed OCR's basic findings, but also pressed for more vigorous sanctions. The Coalition released a copy of a letter to Martin Gerry which, after a perfunctory statement of congratulations for OCR's efforts, went on to question the accuracy of OCR's conclusion that lay-offs had not adversely affected minorities. (It did not, however, offer any statistical analysis.) It declared that any minimally acceptable settlement with the Board must include "affirmative action retention and recall of minority teachers," constructive retroactive seniority and affirmative action for women. The coalition strongly urged that its constituent group be "thoroughly advised and consulted about the substance and progress of your compliance proceedings."

This letter had an implicit message. It challenged OCR to produce more actual reforms than had been accomplished previously by other agencies that had made similar findings. It hinted that if the coalition members had been consulted by OCR during its investigation, OCR might have done a better job of analyzing the lay-off issues. In essence, the letter was an offer of support coupled with a warning that given "the Board's open antagonism" and union opposition, OCR needed the advice and support of local groups so it would not be misled about the effectiveness of proposed remedies and so it would have some political counterweight to the anti-OCR forces.

2. The Gifford Report.

Chancellor Anker appointed a fourteen person committee chaired by Deputy Chancellor Gifford to analyze the OCR findings and present a report to the Board of Education. For all intents and purposes, the "committee" became Gifford and his staff.

Gifford's approach to this project fit a familiar pattern. As one former high Board of Education official put it, Gifford was a "brilliant maverick...[he] would never talk to people as far as I know. Suddenly, a report would come out." In this case, also, the conclusions in the report were unexpected. Several Board members angrily rejected Gifford's first draft, seeing it as a brief for OCR's position. The Chancellor then transferred responsibility for developing the Board's response away from Gifford and to his counsel, Michael Rosen.

But the draft report did not die. Gifford circulated it privately and revised it. A copy reached the New York Post, which played it up as a secret internal document that had warned the Board that OCR had proven the existence of employment discrimination against minority teachers. Eventually, Gifford published the report under the title, "Race, Ethnicity, and Equal Employment Opportunity: An

Investigation of Access to Employment and Assignment of Professional Personnel in New York City's Public Schools" (the "Gifford Report") which included a disclaimer that the document "should not be construed as Board of Education" policy. The Gifford Report continued to influence the Board of Education (its official reply to OCR consisted mainly of expurgated selections from Gifford's draft), and it affected the way issues were treated in the negotiations and in subsequent court proceedings. For these reasons, the report's main conclusions should be described in summary form. Thus, the main conclusions of the Gifford report were that:

a) Based on an analysis of the "labor pool" from which teachers are hired, one would expect that, in the absence of discrimination, the proportion of minority teachers in the New York City system to be 22%, that is, about twice the actual percentage.

b) OCR's conclusions about the racially disparate impact and lack of validation of New York City's testing procedures were correct. Whether or not the examination system was illegal, it violated "the most elementary canons of psychometric testing"[27] and represented bad educational policy.

c) The Decentralization Law was not the historical cause of racially identifiable faculties. Rather, teacher segregation existed prior to decentralization, and at most, decentralization accentuated a pre-existing problem.

d) The New York City Board of Education could not be held responsible for the two track hiring system which was enacted by the Legislature as a compromose intended to improve education in minority schools. But the Board was not doing everything it reasonably could do to mitigate the segregatory effects of this law.

e) OCR was correct in assuming that under existing law, it could prove a violation of Title VI based on discriminatory impact, without providing actual intent to discriminate.

The basis for these conclusions was set forth in 323 pages of text, appendices and tables (about eight times the length of OCR's letter and tables). It included 100 pages of legal analysis warning the Board that it could be found liable on all of the major race discrimination violations. In short, it was an advocacy document basically supportive of OCR's objectives but quietly disdainful of the quality of OCR's analytical work product. In the space of three months Gifford had undertaken to do a better analytical work-up than OCR had accomplished over three years with vastly greater resources.[28]

Notwithstanding its copious and ambitious analytic content, the Gifford Report was largely a political document. Gifford seemed to be trying to bridge the gap between the Board of Education, the UFT, the AJC, and other "establishment groups" on the one hand, and the minorities and advocacy groups on the other. His analytical sections would deprive the anti-OCR forces of their decentralization arguments and make it clear that something had to be done to get more minority teachers into the system. His legal analysis was a reply to the legal objections raised in the AJC position paper, and might induce the Board, and even, perhaps, the UFT, to take voluntary action in order to avoid legal compulsion from OCR or the courts.

At the same time, however, Gifford presented himself as an adherent of the merit system and a believer in equality of opportunity philosophies. He eschewed "quotas" and proposed "goals".[29] His blistering attack on deficiences in the current examination system was repeatedly qualified by assurances that "examinations are a necessary part of the teacher cetification process in New York City."[30] In short, the Gifford Report must be seen as both an attempt to set the record straight on several controversial factual issues and to organize a coalition of educational groups around a signficant, but philosophically moderate, reform program.

3. The Board of Education.

On April 22, 1977, the Board of Education transmitted to OCR its official response to the First Letter of Findings.[31] This document contains 28 pages of text and 10 pages of appendices. The longest section of the report (12 pages) was the Board's proposed "Equal Employment

Opportunity Plan".

The brevity of the Board's replies to OCR's specific findings, relative to the space devoted to the Board's EEO plan, reflects both tactics and substance. The Board declared that it "is and will continue to be in compliance with applicable federal laws and regulations." At the same time, however, the Board response acknowledged that there were "inequities...in employment opportunities" in the school system. These inequities were caused by forces outside the control and legal responsibility of the Board, but as a matter of sound educational policy, the Board nevertheless was "committed to increasing opportunity for minority employment and to avoiding discrimination in appointment or assignment of staff at all levels."

Thus, the EEO plan was the Board's way of saying that it was unnecessary to go into a full scale factfinding proceeding regarding OCR's allegations, because the Board was already prepared to do everything it reasonably and lawfully could be expected to do to rectify the problems.

Content-wise, the Board's response was a patchwork quilt built on swatches from the Gifford Report.[32] The pieces are held together by transitional statements that emphasized the Board's good intentions and OCR's ignorance of local procedures and politics.

For example, the Board response emphasized that the alternative hiring system was enacted as New York State

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policy in an effort to improve education in predominantly minority schools. It recited statistics from Gifford's Report showing that the alternative system appears to have caused gains in the number of minority teachers employed in the system. This discussion led to an edited version of Gifford's criticism of OCR's use of comparisons between New York City and other cities with respect to the proportions of minority pupils. However, no mention was made of Gifford's labor pool analysis which, as discussed above, ended up confirming OCR's suspicions.

The Board's EEO plan provided an excuse to avoid a detailed refutation of several allegations in the letter. If OCR was interested in results, the Board seemed to be saying, then it should be satisfied with these proposed remedies. The key proposals in the Plan were as follows:

a. Increasing employment opportunities for new teachers

During a period of lay-offs, creative ways had to be found to induce some current teachers to retire or take leave. Two specific suggestions were a pre-retirement program for older teachers (early retirement or part-time employment), and work sharing programs.

b. Improving the distribution of teachers and supervisors

1. New assignments. The Board would use the opportunity created by the lay-offs and attendant seniority "bumpings" and recalls to "foster integration of minority

and non-minority personnel" and correct any disparities of experience, salary and educational level.

2. Voluntary transfer plan. Teachers would be allowed to transfer freely to vacancies when the transfer would help a school and district move closer to the city-wide racial-distribution index.

3. Selection and assignment of supervisory personnel. The selection procedures approved in the Chance case would be "strengthened and improved." Criteria such as "role model," which tend to discriminate based on race, national origin or sex, would be eliminated. Where feasible, subjective criteria would be objectified or eliminated.

c. Teacher selection methods.

1. The Board would seek legislative changes to eliminate the rank order list system.

2. Some of the teachers in the eligible pool might be given preferences for hiring based on job-related factors that also would improve opportunities for minority persons. (This proposal was derived from Gifford's proposal for a "Stratified Random Appointment Procedure.")

3. The Board would initiate a research and development program to create a new "equitable, valid system for teacher certification and selection."

In making these proposals, the Board also specifically rejected some other remedies. It said that using New

York State certification, rather than a separate examination to license teachers in New York City, would be completely inappropriate. Also, its equal opportunity proposals eschewed use of any "quotas," and in proposing methods for reducing disparities in teacher assignment, the Board excluded the use of forced teacher transfers.[33]

4. The New OCR Director's Reply.

The New York City Board of Education's Response to Martin Gerry's First Letter of Findings was received shortly before David Tatel became Director of OCR. Tatel wrote a reply to the Board's response on July 6, 1977 and used it as an opportunity to reassess the situation and clarify his administration's approach to the issues.

Tatel wrote that he wanted to focus the negotiations on certain "essential" issues. First was teacher assignment. In order to comply with Title VI, Tatel said, the Board would have to "reassign teachers and other staff so that there is no more than a 5% deviation from the system-wide ratio in any school in the system." This reassignment should be completed in the beginning of the approaching school term, he added, "unless impossible."

The second issue was employment tests. Tatel insisted that the Board of Examiners tests and rankings procedures be validated in accordance with the Griggs[34] standard. And, as required by the testing guidelines of the federal Equal Employment Opportunity Commission (EEOC) and even if the tests were validated but still resulted in disparate import, the Board would have to try to find another selection device that had less of an adverse racial impact.

Third, Tatel noted that the Board expected to rehire some 4,000 teachers during the approaching term and he said that this recall should be used effectively as a vehicle to eliminate the violations cited in the letter of findings.[35]

For all practical purposes, Tatel dropped three of Gerry's allegations. He did not mention comparability of instructional resources (teacher experience, salary, degrees); comparability of coaching services; or maternity leave policies. Also, he changed priorities. Teacher assignment now was at the top of OCR's list.[36]

Tatel's letter and an accompanying staff memo rejected the Board's EEO Plan, which was said to lack sufficient detail to make a full response possible. The major difficulty was that it did not predict what results would actually be accomplished through its proposed reforms and how soon they would occur. OCR also objected to the Board's unwillingness to adopt the "alternative" hiring procedure as the basic citywide procedure.

II. THE NEGOTIATIONS

A. The Setting

In early July, 1977, OCR and the Board of Education commenced an intensive negotiating process that would result two months later in the signing of a memorandum of agreement resolving all outstanding issues raised by the First Letter of Findings. The atmosphere was tense, and at the outset it was far from clear that agreement would be reached and litigation or funding cut-off sanctions avoided.

OCR was in the process of concluding a difficult six-month negotiating process in Chicago. There, the Board of Education had reluctantly agreed to accept a mandatory transfer plan that would result in 1700 forced moves that next September -- but only after an administrative law judge had ruled decisively against them and a series of political appeals, including union overtures to Secretary Califano and the White House, had failed.[37] Compared with Chicago, the issues in New York were even more complex and the power of the teacher's union, (if not the Board of Education) to resist major OCR demands, was more intense.

As in Chicago, OCR had decided to run the negotiations directly from the Washington office, rather than from the regional office.[38] Here, however, in addition to calling upon the expertise of special consultant Nick Flannery, Tatel himself flew up to the city to take part in the critical sessions.[39]

On July 14, 1977, in the ominous atmosphere of a power black-out, all of the main actors in the negotiations came together for the first time. David Tatel set forth

OCR's position and objectives, flanked by his chief negotiator, Nick Flannery, and several younger staff lawyers and aides. Representing the Board of Education was Chancellor Anker, his chief negotiator, Chuck Schonhaut, his counsel, Michael Rosen, his director of personnel, Frank Arricale II, and various staff members.

During the next seven weeks, day-to-day negotiations would be conducted by Flannery and Schonhaut. Tatel and Anker would periodically confer, and Tatel would return for a "climatic" session in early September. At the negotiating table, the Flannery-Schonhaut relationship quickly became one of cordial, professional bearing and mutual respect, as did the Tatel-Anker relationship at the policy-making level. Flannery was favorably impressed by the intentions, administrative competence and sensitivity to racial ethnic issues shown by most of Board representatives with whom he dealt (especially in comparison to their counterparts in Boston). However, he also felt that as one moved down the Board's hierarchy, problems of administrative competence began to surface. The Board representatives, for their part, had similar negative perceptions of the OCR personnel below Tatel and Flannery, commenting that they were "self-righteous," "accusatory," "insensitive to educational needs."

From the beginning, a number of important scenes were played off stage. The morning after the first session, Tatel "marched downtown and briefed Shanker" about the previous day's events.[40] (HEW Secretary Califano had wanted the UFT to be at the bargaining table proper, but the Board objected.)[41] However, Tatel's and Anker's offices kept the union informed on a regular basis about the negotiations.

There came a point about halfway through the negotiations when the UFT become very dissatisfied with this indirect arrangement. Sandra Feldman, one of Shanker's top aides, arrived one morning at the Board of Education and "barged right into the meeting and said we just had to be here."[42] "No one tried to move me," says Feldman, whom Flannery later called a "formidable" representative, and from that point on the UFT was at the negotiating table.[43]

Aside from the UFT's consultative and later participatory role in the negotiations, no other local interest group played any significant part. There were some ad hoc discussions with the civil rights lawyers in the Rubinos case, but OCR made no significant effort to provide the minority group organizations with anything like the consulting relationship demanded of OCR in the coalition's letter to Martin Gerry of December, 1976. In September, upon hearing that a Memorandum of Understanding had been signed, the NAACP's lawyer's first response was to write to OCR protesting his organization's exclusion from the negotiating process.[44]

B. Incentives for Settlement.

Both OCR and the Board of Education wanted to settle. Besides the normal reasons for settling any dispute (eliminating the risk of losing in court, reducing transaction costs,etc.), there were also particular historical, political and institutional factors that strongly pushed both parties in this direction.

The special incentives for the Board were financial and political. The Board was not immediately concerned about the possibility of being subjected to the ultimate Title VI sanction, a total cut-off of federal funding.[45] It realized that it could delay a cut-off for months (or years) in administrative proceedings and then probably still avert the sanction at the last minute by adopting a compliance plan. Moreoever, it was hard to imagine any President countenancing the withholding of approximately $365 million from New York City.[46]

But Tatel's July 6 letter referred to a new financial sanction; OCR had declared the central board and a number of community school boards ineligible to receive ESAA grants for the 1977-78 school term. Through various grant applications, $17 million in aid had been sought. This amount was not overwhelming, but the threat of its loss was immediate. If the finding of ineligibility was not waived by OCR before a September deadline, the funds would be lost irretrievably.[47]

The ravaging effects of New York City's fiscal crisis, made the threatened loss of ESAA and CETA grants into a much more formidable sanction than it would have been in years past. On the eve of the negotiations, this is how the school system looked from 110 Livingston Street:

> "Programs and courses have been cutback or eliminated; classes were overcrowded; for the most part, the teachers who had been laid off were younger teachers, many of whom were minority; in some areas of instruction, even senior teachers had been laid off; as a result of frequent excessing, many of the teachers in each school were new to that school and unfamiliar with its programs and students. For the Board of Education, this presented major problems and had contributed to further deterioration in public confidence in the school system, as parents found their children placed in large classes taught by teachers who were new to the school and as experimental programs and such "frills" as music, art, and physical education programs were severely cut back."[48]

The view from UFT headquarters was not any better:

> "Not only had the union been unable to secure any major salary increase for the teachers during the prior negotiation and strike, it had given up teacher benefits in exhange for a [shortened school day] program which was unpopular with teachers and parents. Finally, the union had been unable to provides its membership with a fundamental and traditional union benefit: job security."[49]

Settlement would also be desirable if it would quickly dispel a cloud of suspicion about the Board's commitment to racial justice and equal opportunity. For decades, people like Chancellor Anker and the Board of Education's Secretary and Legal Counsel, Harold Siegel, had advocated integrationist goals. While there is considerable room for argument about how firmly or competently the Board

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of Education implemented those goals, there can be no doubt that in 1977 these representatives of the Board of Education deeply resented OCR's accusations. The accusations, nevertheless, carried significant credibility because they came the federal agency chiefly responsible for ending blatantly discriminatory practices in southern school systems. Furthermore, argue as they might that the Board was not responsible for the racially disparate teacher assignment patterns, Board officials were apprehensive that OCR might prevail on these (and other) issues in court.[50] A settlement could quickly remove the cloud created by the charges and replace them with OCR's certification that the Board was fully committed to guaranteeing equal opportunity.

These ideological concerns, of course, had political ramifications. The Board presided over a racial-ethnic volcano. Since the early 1950's, it had made considerable efforts to convince minority groups that their interests were the Board's concerns. Hence, each time the various commissions rendered findings about discrimination in the school system, the Board responded with ringing declarations of its dedication to improving the opportunities for minority children. In the late 1960's the volcano erupted around the issue of community control and the school system was almost torn apart. These conflicts eventually were channeled into legislative bargaining, producing a compromise decentralization statute that had led to a decline in confrontational politics. The OCR charges, however, had a potential for renewing racial and ethnic polarization.

Board officials sought to minimize this risk. It was a difficult balancing act. Minority constituencies wanted remedies for documented conditions of inequality. But, professional organizations and Jewish groups remembered the widely publicized anti-Semetic incidents during the community control battles, and would mobilize political support to prevent changes that they considered would weaken the "merit system". To avoid antagonizing the latter constituency, the Board could not agree to "quotas."

For OCR, reaching a settlement with the Board was the only practicable way to satisfy several interrelated goals and pressures. To begin with, it must be remembered that OCR was under Judge Sirica's order in Brown[51] to resolve promptly the New York City Review either by reaching an agreement or by initiating enforcement proceedings. David Tatel had close professional associations with the civil rights lawyers who had brought that case. Therefore, the New York negotiations would be a major test of the new administration's resolve and its ability to distinguish itself from the taint of non-commitment to civil rights enforcement with which the Court had tarred its predecessors.

In addition, although Tatel had reformulated the issues in Gerry's letter of findings and was pressing only the key items that were strongly supported by the evidence, the fact remains that he thought Gerry's Big Cities Review was a misallocation of resources; for him the New York issues were not the most critical items on the civil rights agenda.[52].

Was OCR's position also influenced by political pressure? OCR kept Senators Javits and Moynihan informed about the negotiations, and it sent at least one briefing memo to Vice-President Mondale. However, Flannery insits that Tatel insulated him at the negotiating table from any political interference and Tatel give credit to Califano for providing him with similar protection.[53]

The perceptions of Board and UFT representatives confirm these accounts. Rosen concludes: "Despite efforts by the Board to rally support in the Congress against OCR or to put pressure on HEW/OCR, I think there is little evidence that these efforts had any significant yield."[54] Similarly, Feldman says that while the UFT had access to federal political officials "as high up as the White House," the union mainly received "a lot of sympathy", together with the assurance that "the worst" would not happen. It seemed to her that "the Justice Department and the Office for Civil Rights were pretty independent.....[T]here were bureaucrats who had been working on this for years and years and you could only affect it so much politically."[55]

In a larger sense, of course, the negotiations had

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to be considered political. If the political importance of New York City and Albert Shanker to Democratic politics was not exchanged directly for bargaining chits, it still clearly influenced expectations about how far OCR could push, and what affect the outcome would have on HEW's overall standing with the White House and Congress. Schonhaut notes, for example, that when he sounded out Shanker about agreeing to a point that had been part of OCR's Chicago settlement, Shanker simply replied, "No, this is not Chicago."[56] This larger political picture must have been part of the general sense at OCR that there were reasons it would be desirable to move on to something that was "less draining, unpopular, and prickly."[57]

C. The Final Agreement

Given that there were strong incentives for settlement on both sides, what were the minimal requirements for the substance of an agreement. For OCR,

> "What I [Tatel] wanted more than anything else was to get an agreement which would begin to move the school system to a desegregated faculty."[58]

Also, it was important to OCR that "desegregation" be defined according to the standards set forth in the leading faculty integration case, Singleton v. Jackson Municipal Separate School District.[59] That holding required the racial composition of faculties in schools within a district to vary no more than 5% from district-wide proportions of minority and non-minority teachers.[60] Of course, OCR had vigorously pursued a number of other issues at the bargaining table, but the Board negotiators correctly perceived that staff integration was OCR's "bottom line."[61]

The Board's instruction to its negotiators was to stay as close as practicable to the content (and presumably to the degree of generality) of the Board Response of April 22, 1977. That document did contemplate racially conscious teacher assignments, a significant break from the Board's past policy, but this commitment had two specific limits. First, the Board would not agree to compulsory transfers of teachers to accomplish faculty integration. Second, there could be no racial hiring quotas.[62]

1. Faculty Integration

Faculty integration, the issue laden with sensitive, result-oriented "quota implications", proved to be the easiest question to settle. This issue was dealt with first (before the UFT became an active participant in the negotiations) and was resolved quickly. The resolution, however, proved troublesome in the long run because the agreed language -- which apparently allowed each side to think it had prevailed on its key objective -- was ambiguous and would come to cause major difficulty at the implementation stage.

The essence of the agreement was that OCR's 5% Singleton standard was accepted[63] as the faculty assignment benchmark, but the Board would be given substantial time and great latitude in methods to achieve the desired ratios. Specifically, the agreement provided that:

> "1. Not later than September of 1979, the teacher corps of each District in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.
>
> "2. Not later than September of 1980, each individual school in the system will reflect, within a range of five percent, the racial-ethnic composition of the system's teacher corps as a whole for each educational level and category, subject only to educationally-based program exceptions.
>
> "3. The Board of Education will demonstrate to the Office for Civil Rights, subject to prescribed review, that any failure to meet the commitments set forth in paragraphs one and two hereof results from genuine requirements of a valid educational program. In addition, the Board will demonstrate that it has made and is continuing to make special efforts to overcome the effects of educationally-based program exceptions through effective use of such mechanisms as recertification, recruitment and special assignment of teachers.

In the bold print, these provisions were a victory for OCR. In the fine print, however, they substantially met the Board's bottom line needs. OCR obtained its 5% Singleton standard but the Board got unprecedented flexibility[64] to meet that goal. It was not to be expressly held accountable for any degree of progress towards the 5% standard until after two years, and an additional year was provided to complete integration down to the individual school level. Further flexibility derived from separate treatment of high schools and special central programs.[65] Finally, even at the end of three years, the Board could justify non-compliance with the standard by showing that this resulted from "educationally-based program exceptions,"[66]

A comparison with the teacher assignment plans negotiated by OCR in the other three big cities is instructive. In Chicago, Los Angeles and Philadelphia, OCR accepted a 10% deviation ratio rather than the 5% it achieved in New York,[67] but in each of the other cities immediate compliance with the agreed ratios was explicitly required. In Chicago and Philadelphia, agreements reached in mid-summer required full implementation by September;[68] in Los Angeles partial implementation (to a 15% ratio) was required for September and full compliance a year later. And, most importantly, in each of the other three cities, the agreement explicitly called for mandatory teacher transfers to achieve the agreed upon goals. The New York agreement did not directly deal with the critical mandatory transfer issue and its ambiguity on this point was to become a major sticking point.

The text of the agreement does not expressly say that mandatory transfer must be utilized but neither does the text exclude them. Clearly, the Board would have wanted an explicit exclusion for forced transfers (according to Rosen, the UFT specifically asked the Board to get such an exclusion inserted into the text[69]; conversely, OCR clearly would have liked explicitly to include mandatory transfers, but agreed to a text that ommitted such a reference.

Subsequently, controversy arose between the Board and OCR as to whether the parties had actually agreed that the text should be interpreted to mean that if the Board failed to accomplish compliance with the Singleton standards by other means, it would have to resort to involuntary transfers. Tatel and Flannery say there was such an agreement. Anker and Schonhaut flatly deny it.[70]

Tatel and Flannery say that they discussed the possibility of forced transfers with Anker, and he acknowledged that if voluntary means were unsuccessful, the Board would have to use involuntary transfers to complete the integration of the faculty. Anker asked for and received a period of three years to meet the standards. They also say that Anker argued that if mandatory transfers were mentioned in the agreement, it would be impossible politically for the Board to sign it. Tatel and Flannery say they relied on Anker's "unequivocal"[71] oral assurances because "it was better to have an ambiguous agreement than to have no agreement at all. . ."[72]

Anker denies that he committed the Board to the possible use of forced transfers. To the contrary, he says he was aware of the plans for "wholesale transfers" in

Chicago and "I can consider it a great victory that we did not have to submit to that deal."[73] He points out, as well, that he had to weather criticism from some quarters in order to agree to as strong a faculty integration plan as he did.

Schonhaut says that the possibility of forced transfers was never discussed in terms of commitments. He and Anker believed that integration would be achieved by voluntary means, and OCR accepted their projections. OCR's reasonable expectations under the circumstances, he suggests, would be that in the event the goals were not achieved after three years and OCR wanted forced transfers, than OCR would have to go to court to enforce the Singleton standard and to try to convince the court that forced transfers were required. In short, according to Schonhaut, both sides retained their options: OCR did not agree to waive forced transfers, but neither had the Board conceded an obligation to use them.[74]

2. The Examination System

The second major issue area covered in the negotiations was what OCR referred to as "testing" (or "access to employment") and the Board and the UFT called the "merit system". There was a prolonged and intense debate on these issues. Ethel Fitzgerald, Chairperson of the Board of Examiners (who was herself black) took part in these sessions and argued vigorously with the OCR lawyers about test validation and methodologies.

The changes finally agreed to would have the following new features:

> a) Teacher licensing tests would be validated in accordance with "accepted professional standards";
>
> b) Eligibility lists by license would be merged;
>
> c) Rank ordering of persons on lists would be abolished; and
>
> d) Appropriate affirmative action mechanisms, consistent with the above reforms, would be developed and implemented.[75]

The merger of lists and elimination of rank ordering would require modification of existing state law or a court order. To this end, the Board committed itself to "sponsor and actively support state legislation"[76] and, in the event its legislative initiatives failed, to "seek appropriate litigation in support of the agreed objectives."

OCR's main goal in this area was to assure that the examination system conformed to EEOC standards of predictive validation. But during the negotiations, OCR operated under two main constraints. First, while the OCR lawyers were confident that the teacher examination system violated the legal standards of Title VII ofthe 1964 Civil Rights Act, they realized that legal precedent was not clear as to whether such practices violated Title VI , which was the basis for OCR's jurisdiction in this situation.[77] The long pending New York City teacher examinations case, Rubinos v. Board of Education was a Title VII case. Tatel was concerned about the lack of progress there, and how that could hinder OCR's efforts. Furthermore, OCR was vulnerable to the argument that these issues should be left to the courts since Rubinos predated OCR's findings and a court would have greater authority to implement appropriate remedies.

Second, OCR was sensitive to charges that it was proposing changes in the name of equal opportunity that actually would destroy the merit system. Gerry had argued, with unchallengable logic, that if the Board hired teachers for ghetto schools using the NTE examination, then they could have no objection to hiring teachers for any school using the NTE. The Board's response was that neither the NTE or state certification requirements really could accurately measure teacher qualifications. Tatel felt the Board had a point[78] and he was not going to go to any great lengths to try to get the Board to agree to either of those alternative methods.

OCR's position was strengthened, however, by the somewhat surprising fact that the Board of Education agreed in large part with OCR's objectives.

It reacted to OCR's allegations with "ambivalence approaching guilt."[79] For years, the Board had been battling with the Board of Examiners. At various times it had supported legislation to curtail or virtually abolish the Examiner's functions, and it already had submitted bills specifically calling for merger of lists and limination of rank ordering. During the negotiations, Mrs. Fitzgerald, and the Board's Executive Director of Personnel, Frank Arricale, engaged in vitriolic arguments and feuds. Still, the Board was mindful of the political sensitivity of changes to the examination system and it had to place some limitation on its concurrence with OCR. It refused, for example, to agree to changes that were not clearly spelled out by legislation or court order and it also refused to commit itself to support the plaintiffs in Rubinos.

Because the Board was in favor of abolishing rank order and merging the lists, the main issue in dispute during the negotiations was test validation. OCR's lawyers said they wanted teacher tests to be validated by the method of predictive validation.[78] This high standard of validation had been required by guidelines adopted by the Equal Employment Opportunity Commission,[81] but a subsequent effort to coordinate federal government standards had resulted in the issuance of somewhat different, "uniform guidelines"[82], which also also permitted an easier to satisfy method called content validation.[83] Feldman and Fitzgerald argued that the existing tests were content valid. They challenged OCR's staff lawyers to give any example of a teaching test that have ever been shown to meet the standard of predictive validity.[84] OCR, they said, was demanding the impossible. This attitude, said Feldman, was "disgraceful." "They didn't care about educational standards or maintaining qualifications."[85]

From this battle emerged another ambiguous provision. The tests would be validated by standards "exemplified" in the Uniform Guidelines. Also, OCR would have to be consulted in connection with the design and development of proposed validation standards.[86]

3. Affirmative Action In Hiring

The last major provision to be negotiated surpassed all the previous ones for ambiguity and open-endedness. Paragraph Six purported to establish an overall goal for affirmative action employment.[87] It was meant to quantify the overall minimum results to be accomplished through the new testing and hiring procedures, by requiring that for September 1980,

> "the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant qualified labor pool."

The above-quoted commitment, however, neither identifies the labor pool, describes its composition, nor says how wide a "range" will be considered "representative." These questions all were left to the investigation of an "independent expert acceptable to the parties."

Paragraph Six becomes more explicit when it turns to actions it does not require the Board to take:

a) No teacher need be laid off;

b) No teacher need be hired who has not met "appropriate requirements for employment";

c) No "quotas" are established; and

d) No liability is incurred by the Board if it fails to meet the affirmative action goals but has made "a good faith effort."

OCR's objectives in this area had been far more ambitious. Being familiar with the Gifford's labor pool study, it sought a specific figure close to Gifford's 22%. The Board, although it was prepared to make some commitment to affirmative action and to increasing the number of minority teachers, was unalterably opposed to any form of commitment that could be viewed as a "quota".[88]

Rosen reports that this issue was one of the few actually debated by the full Board of Education during negotiations. Some Board members thought that a labor market study would find an under-representation of minority teachers in the system; others believed an accurate study would show the Board had a good record for minority employment. The Board finally agreed to accept an open-ended labor pool approach if the "independent expert" conducting the study were primarily responsible to the Board; they believed that the results of the study would largely be determined by the design of the study itself.[89]

By the end of the summer, the main elements for an overall agreement were close to being hammered out by the negotiators. It was not clear, however, that their tentative agreements would be approved by the principals. Acceptance of the Agreement on the Board's side was especially shaky because the UFT was lodging vigorous protests against the 5% faculty assignment ratios that the Board's negotiators had tentatively accepted early in the summer, before the Union had actively entered into the negotiations.

The atmosphere during the tense concluding weeks was also affected by a newly announced federal threat. The Labor Department notified the City of New York that because of OCR's finding of violations of Title VI, the City could not go ahead with plans to allocate several million dollars of its grant under the Comprehensive Employment and Training Act ("CETA") for the use of the Board of Education, and it intimated that the Board's "share" might be denied to the City altogether. The Board (and the UFT) had planned on using this CETA money to rehire 1,200 new teachers, thereby reversing the tide of lay-offs that had so severely affected the school system.[90] This Title VI deferral threat could not be stalled procedurally. Because CETA was a new program, the Labor Department had authority to defer the funds immediately -- in September, 1977 -- and it was expected to take a firm stance. (The Labor Department official who stood behind this possible sanction was Ernest Green, a black who had gone to high school in Little Rock, Arkansas under the protection of national guardsmen in 1957.)

Thus, under the long shadow of the CETA deadline, Tatel and Anker ironed out the remaining differences and executed the agreement. But that was not the end of it. Because the Board had repeatedly emphasized the power of the UFT in the New York Legislature (and thus the need for the union's cooperation on legislative changes), OCR insisted that Shanker co-sign the agreement to the extent of guaranteeing UFT support for the statutory changes on the examination issues. The agreement was sent to Shanker. In a telephone conversation with Tatel, he strongly objected to signing it. Finally, he did sign, but only while penning in the additional phrase, "under protest."[91]

III. COMPLIANCE

Implementation of the teacher assignment provisions of the First Agreement began in September, 1977, only a few days after the final version had been signed. Although no mandatory transfers were to be attempted, as in Chicago and Los Angeles, the Board was in the process of recalling many teachers who had been laid-off during the fiscal crisis the year before, and re-assignment of those teachers would be done in a manner that would move the system toward compliance with the faculty assignment goals of the Agreement.

The Board's Office of Personnel set up a new procedure at its "hiring hall." When a teacher's name was called, he/she would walk to the front desk where a personnel officer would visually categorize the individual by race, and then direct him or her to draw an assignment from one or two boxes. The first box contained all the vacancies in schools which were "short" on minority teachers; the other contained vacancies in all the schools requiring more white teachers.

When descriptions of this hiring hall procedure were transmitted by the press, there were immediate expressions of outrage. Senator Moynihan made an impassioned speech on the floor of the Senate, attacking OCR and the agreement; he likened the mechanism for racial assignments to the practices of Nazi Germany. UFT President Shanker, in his New York Times weekly column, reprinted Moynihan's speech.

Minority group representatives had considered themselves frozen out of the negotiations and were less than enthusiastic about the content of the agreement, but they now felt impelled to defend it publicly because of these attacks which, to their minds, were ill-formed and racist. The Amsterdam News criticized Moynihan, and the New York Civil Liberties Union sent the Senator an extremely detailed explanation of the agreement and what had given rise to it.[92]

In this highly-charged atmosphere, a group of community board members, teachers, supervisors and administrators, who had previously opposed the Review through court skirmishes and other actions, began to plan a frontal challenge to the Memorandum of Understanding. At the end of October, they filed their complaint in Caulfield v. Board of Education.[93] The UFT and the supervisors' union, the CSA, intervened and supported the plaintiffs' main claims.[94] The Coalition of Concerned Black Educators represented by the NAACP and the New York Civil Liberties Union, intervened as defendants.[95]

In addition to Caulfield, a separate spate of federal court cases was filed in connection with disputes between OCR and the Board of Education about the central board's eligibility for ESAA funds. The Board, of course, believed that it should never have been declared ineligible for ESAA funding in the first place, but even assuming that OCR's declaration of ineligibility was justifiable, it now thought that its acceptance of the agreement should have "cured" any deficiencies. OCR, however, said it could grant a waiver of ineligibility only if there were a plan for immediate faculty desegregation; since the agreement contemplated a three-year phase-in, the Board would not be eligible for ESAA funds until 1980.[96]

The Caulfield case came to dominate the relationship between the OCR, the Board and the other interested parties for the next two years, and it delayed implementation of the agreement. The first major obstacle occurred when some of the community board plaintiffs asked the court to enjoin the Board from conducting surveys of the ethnicity of teachers to gather information needed to comply with the teacher integration goals. Judge Weinstein denied this request,[97] but shortly thereafter, issued a ruling invalidating the Agreement itself. His ruling was novel. Without identifying any express procedures in Title VI that had been violated, he found that:

> "Title VI mandates that drastic governmental action of this nature that affects the lives of hundreds of thousands of citizens cannot result solely from secret, informal negotiations conducted exclusively by a handful of government officials. HEW regulations must provide for some form of public participation in such critical decision-making by those whose rights are directly affected."[98]

Thus, although he did not rule that the substance of the agreement was unconstitutional or otherwise unlawful as urged by the plaintiffs, he did enjoin implementation of the agreement pending HEW's holding of due process proceedings.

HEW and the Board immediately appealed Judge Weinstein's order. While the appeal was pending, OCR requested that the Board of Education continue to implement the provisions of the agreement on a voluntary basis. The Board, however, declined. Consequently, there was no implementation activity between mid-March 1977 and September

1978, when the Second Circuit Court of Appeals reversed Judge Weinstein's decision and reinstated the Memorandum of Understanding, pending a full trial on the merits of plaintiffs' substantive claims.[99]

During the hiatus in implementation caused by Judge Weinstein's injunction, Frank Macchiarola had become Chancellor. The lifting of the injunction at the beginning of the 1978-79 school term put the focus on the new administration. How vigorously would it attempt to implement the controversial agreement signed by its predecessor? The Agreement required the Board to prepare a detailed implementation plan and to submit yearly progress reports. In December, 1978,[100] the Chancellor's office submitted to OCR a document intended to satisfy both of these requirements.[101]

The Board's report was an amalgam of descriptions of accomplishments, implementation problems and plans for the future, with voluminous exhibits attached. OCR was extremely critical of it.[102] It was said to lack the specificity necessary for OCR to measure whether the Board was making progress towards achieving the intent of the Agreement. Also, OCR stated that the facts indicated that the Board was failing to make progress towards teacher integration and faulted it for having no back-up plan to assure compliance with the 5% goals if its voluntary efforts failed.

In January 1979, the Board took action in three areas. It reinstituted visual/racial assignments of recalled teachers, though using a more subtle procedure than the hiring hall theatrics of September 1977. It officially began the search for a consultant to do the labor pool study for the affirmative action agreement by issuing a "request for proposals", and it worked on legislation regarding eligibility lists. Chancellor Macchiarola also informed OCR that the Board was committed to commencing litigation to unrank and merge the eligible lists if its current legislative efforts failed.[103]

In September, 1980 the faculty integration deadline passed, without compliance by the Board with the agreement's requirements. A month later, the Board submitted a second progress report which showed that the system-wide percentage of minority teachers in elementary and junior schools was 20.3% which would permit a minority teacher range of 15.3% to 25.3% under the Agreement. Only 9 of the 32 community school districts met these standards. Moreover, only 58 of 115 high schools met the 6% to 16% range permissable at the high school level.[104]

Despite these figures, the Board asserted that because it was acting in good faith in attempting to implement the Agreement it should nevertheless be considered in compliance.[105] Local civil rights advocates disagreed; NAACP attorney Jimmy Meyerson reactivated a dormant federal lawsuit against the Board and OCR demanding compliance with the terms of the Agreement, New York Association of Black Educators II (NYABE) v. U.S. Dept. of Education [106].

In the wake of President Carter's electoral defeat in November, 1980, and the reassessment of civil rights policy by the new Reagan Administration, the Chancellor made a formal request that the Board be deemed in compliance or the Agreement be formally renegotiated.[107] In June of 1982, OCR responded informally by denying the request for modification and telling the Board it would have to implement mandatory teacher assignments. An outcry by the local press and politicians led to a series of prompt negotiations held under the auspices of Senator Alphonse D'Amato (R.N.Y.). Shortly thereafter, Secretary of Education Bell announced that the Department would reconsider the matter.[108]

The product of this reconsideration was the negotiation of a new agreement on the employment issues, concluded in November, 1982.[109] The new agreement virtually relieved the Board of any further substantial mandatory compliance responsibilities. In the controversial area of teacher assignment, the Singleton 5% standard was enlarged to 15%. This change was also accompanied by a significant re-definition of the benchmark figure for minority representation - instead of using the city-wide percentage of minority teachers as the base, each borough would be treated separately.[110] Consequently, in Staten Island and Queens, where fewer than 15% of the teachers were minority, the new agreement would tolerate school faculties having no minority teachers at all.[111] Finally, in the other boroughs even if some schools did not meet with the relaxed standards, the Board would be deemed in compliance if it had made "good faith efforts."

Aside from stating that it supercedes "in all respects" the 1977 Agreement, the 1982 Agreement makes no reference to the issues of teacher licensing tests, legislation to merge eligible lists, and affirmative action hiring. As of July, 1982, there had been no legislation passed to merge and unrank the teacher eligible lists, nor, in light of this failure, had the Board initiated litigation as Chancellor Macchiarola had promised in his letter to Tejada of March, 1979.[112] As far as validation of teacher's tests was con-cerned, several years of communications between OCR, the Board and outside groups was inconclusive. Finally, very little had been accomplished toward the labor pool study in affirmative action.[113] Thus, the new agreement presumably removed any legal obligation on the Board to make further progress in these areas. It remains to be seen, however, whether the NYABA case will reinstate the legal requirements of the 1977 Agreement.[114]

1 Mudge Rose Guthrie & Alexander.

2 *See* L. Panetta and P. Gall, *Bring us Together: The Nixon Team and the Civil Rights Retreat* (1971).

3 *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd* *sub*. *nom*. *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974).

4 *Adams* v. *Richardson*, 351 F. Supp. 636, 356 F. Supp. 92 (D.D.C.), *aff'd* *and* *modified* *en* *banc*, 480 F.2d 1159 (D.C.Cir. 1973); *Brown* v. *Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976).

5 For example, statistical patterns in teacher assignment can establish a strong case against a school district because the district has direct control over employment; but when statistical patterns occur in areas like school discipline and tracking, it is much harder to prove intentional discrimination, the test Tatel believed OCR would have to meet.

6 Anker was Deputy Chancellor 1970-72, and Chancellor from 1973 to 1978.

7 *Parents Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705 (2d Cir. 1979).

8 Anker Interview

9 *See*, *e.g.*, Strayer and Yavner Report Mayor's Committee on Management Survey, Administrative Management of the School System of New York City 755 (1951)); Schinnerer Report (Report by Dr. Mark C. Schinnerer to the New York State Department of Education (1961)); Cresap, McCormick & Paget Report (Management Study for the New York City Board of Education (1962)); Griffiths Report (Teacher Mobility in New York City: A Study of Recruitment, Selection, Appointment, and Promotion of Teachers in New York City Public Schools, New York University (1963 and 1966)); Theobald Report (in Agenda for a City, Institute for Public Administration (1970)).

10 330 F. Supp. 203 (S.D. N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972). A full case study analysis of *Chance* appears as Chapter Six of M. Rebell and A. Block, Educational Policy Making and the Courts: An Empirical Study of Judicial Activism (1982).

11 Civ. No. 2240/74 (S.D.N.Y.)

12 Gerry Interview

13 See discussion in Ch. 5, supra.

14 The 5% figure appeared to be based on the analysis in a working paper that had been prepared by Deputy Chancellor Bernard Gifford. Gifford, "Seniority and Layoffs: A Review of Recent Court Decisions and Their Possible Impact on the New York City Public School System" (November 1975). The main exhibits to the complaint contained excerpts from this paper.

15 This interrelationship is illustrated by the personal professional history of one of the complainants, Delilah Cheese. She was a black teacher who was laid off in 1975 even though she had taught in the system since 1956. She had accumulated no seniority because throughout this period she was licensed as a "regular substitute" even though she did the work of a regular teacher. She was ineligible for a regular appointment because she twice failed the applicable Board of Examiners tests. She now alleged that the licensing tests discriminated against her on the basis of race, depriving her of ten years of seniority and thereby causing her to lose her job.

16 Testimony of Martin Gerry, Trial Transcript dated 5/15/79 at 617-18, Caulfield v. Board of Education.

17 Note that employment discrimination issues never became part of the Big City Review in the other three cities. This was partially because massive lay-offs had not become a problem in those settings and also, perhaps, more fundamentally, because each of the other cities had a substantially higher percentage of minority teachers. Thus, in comparison with New York's 13.2% ratio, Chicago had 43.2%, Los Angeles 31.1%, and Philadelphia 40.2%. (1974-1975) (Appendix C to First Letter of Findings).

18 In setting forth the background to the investigation, Gerry compared New York to other large cities in terms of its percentage of minority teachers, its percentage of minority students, and the inverse relation between these two percentages. After noting that New York had hired minority

teachers at a much lower rate than the other cities, he said that this pattern raised questions for OCR that -- together with the specific complaints -- led it to conduct the New York employment investigation. Although the Cheese complaint had argued that inter-city comparisons actually proved an "irrefutable presumption of discrimination" against New York, Gerry neither expressly nor implicitly accepted this position and he never based any of his findings on a comparison of New York to other cities or of the relative proportions of teachers and pupils. Nevertheless, in the following years, critics of OCR would repeatedly level charges at the agency for allegedly having based its findings on fallacious comparisons of student ethnicity with faculty ethnicity.

19 This list exhaustion requirement directly contradicted the purported merit hiring aspect of ranking by test score. If rank truly reflected merit, how could the system justify denying an appointment to a person ranking #1 on a test given in 1975, until after the appointment of a person ranking #500 on a test given in 1972?

20 It stood to reason that the two track hiring system that Gerry had discussed under the "access" issue should also contribute substantially to the creation of racially identifiable faculties matching the racial composition of the schools' student populations. Interestingly, Gerry did not make this argument. Instead, his allegations of discriminatory assignments were based solely on broad statistical patterns. Later there would be lively debate within the Board, between the Board and OCR, in court hearings and in the press about how much of the segregatory assignment patterns were caused by the alternative systems created by the New York legislature, and how much might have been caused by intentional discrimination.

21 The letter also contained detailed findings relating to sex discrimination. Gerry said that the school system had, on the basis of sex:

> "(1) denied females equal access to positions as principals and assistant principals throughout the system;
>
> (2) provided a lower level of financial support for female athletic coaching programs; and

(3) deprived female teachers of seniority rights and other compensation through failure to eliminate the effects of past discriminatory leave policies."

22 New York Times, Nov. 14, 1976, §4, p. 7, Col. 5.

23 Shanker's first direct criticism of the letter was that Gerry had based his findings of discrimination on statistical comparisons of the percentages of minority school children with the percentages of minority teachers. In fact, as indicated in n. 18, supra, none of Gerry's conclusions were based on such reasoning.

24 402 U.S. 1 (1971).

25 426 U.S. 229 (1976).

26 The American Civil Liberties Union, ASPIRA of New York, the Coalition of Associations of Black and Puerto Rican Educators and Supervisors, the National Association for the Advancement of Colored People, the New York Civil Liberties Union, the New York Urban League, the Public Education Association and the Puerto Rican Legal Defense and Educational Fund, Inc.

27 Gifford Report at 41.

28 An example of an area where Gifford tried to do a more penetrating analysis than OCR concerned the relationship betwen the 1969 Decentralization Law and racially identifiable faculty assignments. As noted earlier, OCR's finding about faculty segregation was based solely on statistical patterns resulting from the two track hiring system. In response, Shanker, the American Jewish Congress and other opponents pointed out that community control proponents, largely from minority areas, had pushed for the Decentralization Law and for these particular provisions. They pictured OCR as an ignorant Washington bureaucracy that had not bothered to learn the fundamentals of local history and politics. Gifford, however, set out to show that this "conventional wisdom" about the history of the Decentralization Law was actually a myth used to cover up a long history of discrimination.

Specifically, Gifford compared teacher racial/ethnic concentrations as they occurred in the 1969-70 term with the 1974-75 term. He used the concept of an "even distribution standard" to indicate the number of minority teachers who would be assigned to a particular group of schools if teachers were being assigned randomly. He reported, on this basis, that in 1969-70, the group of schools which had enrollments 90% (or greater) minority had assigned to them 64.5% of all minority teachers in the school system, instead of the even distribution figure of 36.8%, creating a disparity ratio of 1.75. At the other end of the racial spectrum, in schools which were 90% (or greater) non-minority, the disparity ratio indicated almost seven times more non-minority teachers than were called for under an even distribution. (Id. at 79) Thus, Gifford's first conclusion was:

> "Insofar as the schools of New York City are racially identifiable in terms of staff, this condition existed prior to the passage of the 1969 Decentralization Law." (Id. at 139)

Then, Gifford asked whether there was any indications that decentralization had changed this preexisting segregatory pattern. The answer was striking. In the 90%+ minority schools, the disparity ratio actually had lessened slightly between 1969-70 and 1974-75. In the predominantly white schools, there was some increase in racial concentration. Overall, Gifford concluded that "the situation remained essentially unchanged." (Id. at 79).

The methodological soundness of Gifford's labor pool study was criticized sharply by experts working for the Justice Department and for the Board of Education. Economist Stephen Michelson, an independent consultant, advised United States Attorney Richard Caro that the analysis was technically deficient, incomplete and unconvincing (although Gifford's conclusion, nevertheless, might well be nearly correct). Caro Interview. Similarly, a Board of Education statistician concluded that there were errors in Gifford's econometric model of the labor market that "render it useless." Memorandum to Bernard Esrig from unidentified expert dated October 24, 1977.

29 Gifford Report at 142-44.

30 Id. at 58.

31 "Response to the Board of Education of the City of New York to the November 9, 1976 Letter from the Office of Civil Rights, United States Department of Health, Education, and Welfare" (April 22, 1977). Hereafter called the "Board Response".

32 Except on the Title IX issues, which had not been addressed in the Gifford Report. on these, the Board response disputed each of Gerry's three main allegations of sex discrimination and presented counter-analyses. First, the Board argued that women were not underrepresented in supervisory positions. Compared to New York State and the United States, the response noted, New York City had a much higher percentage of female supervisors. (Ironically, this methodology of making comparisons with other cities was inconsistent with the Board's criticism of Gerry's inter-city comparisons on the percentages of minority teachers.)

The response also challenged Gerry's figures regarding the percentage of women teachers meeting all certification requirements for promotion to supervisor. An "exploratory study" by the Board indicated that 25% of its male teachers but only 10% of its female teachers had earned course credits in the area of administration and supervision. If substantiated, these figures would provide a benign explanation for a disparity in advancement rates between male and female teachers. Despite this counter-analysis, the response also noted the Board's "[concern] with the real drop in the number and percentage of female principals and assistant principals in the elementary and junior high schools over the last seven years." (Board Response at 12). (Implicitly, this quotation was referring to the increased involvement by community school boards in the supervisory selection process which was created as a remedy to that situation in Chance v. Board of Examiners (see n.9, supra).

Second, the Board said that both OCR's facts and legal analysis regarding allocation of coaching services were incorrect. Third, as to maternity leave practices, the Board said that Gerry was asking for remedies that went beyond the Congressional intent in either Title VII of the 1964 Civil Rights Act or Title IX of the Educational Amendments of 1972. And, in any event, these legal issues were currently pending in a case before the Supreme Court.

33 New York City's proposed voluntary plan was substantially weaker than voluntary plans which Chicago and Los Angeles proposed in their intitial responses to OCR's findings of discrimination in teacher assignments. In both of these cities, the Boards proposed specific numerical goals and anticipated timelines for final compliance. Although OCR rejected these plans because the numerical goals were too broad and the timelines too tentative, both plans were more concrete than the New York proposal. In Philadelphia, because of an urgent need to obtain ESAA funding for the coming school year, the Board accepted OCR's mandatory transfer and numerical requirements from the start and did not offer a voluntary plan of its own or enter into any negotiations.

34 The U.S. Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) had upheld regulations issued by the Equal Employment Opportunity Commission for implementing Title VI's prohibitions on employment discrimination. Specific EEOC validation standards were cited with approval by the Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). *But cf.* *Washington* v. *Davis*, 426 U.S. 229 (1976). For a detailed analysis of the extent of the Supreme Court's attitude toward specific test validation standards in these cases, *see* Rebell & Block, "Competency Assessment and the Courts", ERIC Document No. ED 192-169 (1980).

35 A fourth issue was employment of women supervisors. Tatel's letter accepted the Board's "commitment" to develop criteria and regulations that would be fairer to female candidates, and said the parties should work together towards this end.

36 An OCR staff memorandum that Tatel attached to his letter responded to the Decentralization Law points (which were apparently taken quite seriously by emphasizing significant racial disparities in the assignment of teachers in the high schools, and in the assignments of supervisors generally. In neither of these areas, it noted, did the alternative hiring procedure of the decentralization law operate.

On the labor pool issue, Tatel tried to get the discussion back into focus. OCR did not contend "that the ethnicity or race of the teacher population should mirror that of the student population." The real issue was whether there were

> "many qualified minority teacher applicants who are seeking employment with the New York City school system and who are thwarted by deployment of the nonvalidated Board of Examiner's [sic] test."

37 In Los Angeles, the Gerry regime had obtained a mandatory transfer plan the year before, after a relatively uneventful thirty-day negotiating process. The Los Angeles Board of Education had consciously decided not to adopt a confrontational mode (in light of the heavy financial sanctions OCR could wield) and the teachers' union joined in that stance. In 1978, similar concessions were made by the Philadelphia Board of Education and the local union, and a mandatory transfer plan was accepted with virtually no negotiations.

38 The less confrontational "negotiations" in Los Angeles and Philadelphia were conducted by local regional staff.

39 In Chicago, OCR had also hired a special consultant, Conrad Harper, a New York attorney, to be its chief negotiator. (Although several major issues were discussed in Washington, Tatel did not directly participate in the Chicago negotiations). According to Harper, the idea for hiring an outside negotiator originated with Secretary Califano who, after "12 years of inefficacious" formal procedures in dealing with integration problems in Chicago, wanted results in short order. There was a feeling among some of the Washington officials that the local OCR people "could not be effective," partially because the new administration wasn't sure it could trust them and partially because an outsider, starting afresh, could take an "Olympian view" and break through to new ground. (Harper later came to respect greatly the Chicago OCR staff -- as did Tatel, who called them into New York to help re-investigate equal educational services issues. Califano's account of his reasons for appointing Harper also emphasized the "personality clashes between OCR staffers in HEW's Chicago Regional Office and the city's education hierarchy". J. Califano, Jr., *Governing America: An Insiders Report from the White House and Cabinet* 22 (1981).

40 Tatel Interview.

41 *Id.*

42 Feldman Interview. The UFT's ability finally to gain a place at the bargaining table exemplified its enormous power and influence. The teachers' unions in the other three big Cities were rigidly excluded from the negotiating room, although in each of the situations the Board did consult extensively with them (going so far in Chicago as to engage at times in "shuttle diplomacy" between the OCR negotiating table and union representatives in an adjoining room.) Harper, Raymond Interviews.

43 Feldman's strongest impression of OCR's presence at the negotiations was the contrast between Tatel, who was "politically astute," and the OCR staff lawyers who were "zealots" and did not understand the racial and educational politics of New York City and who did not care in the least about "standards."

44 Letter dated September 14, 1977, from James Meyerson to Stuart Baskin.

45 Rosen, "Staff Integration and the New York City School System: Origins and History of the 1977 Agreement Between the Board of Education of the City of New York and the United States Department of Health, Education and Welfare (unpublished paper 1980) at 54 (hereinafter "Rosen Paper"). The author of this paper, Michael Rosen, was Counsel to the Chancellor throughout the period of the OCR investigation and negotiations.

46 On the other hand, the threat may have exerted pressure on the Board indirectly because of New York City's efforts to improve its standing in the bond markets. The federal threat would have to be reported on disclosure statements for potential investors in City securities, and these investors might not have so easily discounted OCR's threat. Schonhaut Interview.

47 This threat was moderated somewhat by the expectations of Tatel and the Board that waivers could be approved for several of the community school district ESAA applications by September even if the central board did not receive a waiver for its own application. Imminent loss of $23 million and $24 million in ESAA funds in Los Angeles and Philadelphia, respectively, sums which represented much larger portions of the District budgets, seemed to have had a much stronger influence on the Boards' positions in those cases.

48 Rosen Paper at 54-55.

49 *Id*. at 55.

50 It is clear that the imbalance patterns in teacher assignments in New York were comparable to those invalidated by the Court in numerous cases. *See, e.g.*, *Bradley* v. *Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974); *Kelly* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972); *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd sub. nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974). However, all the prior cases, including those like *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), which were specifically cited by OCR, involved findings of purposeful discriminatory intent which were absent in New York. Although the issue as to whether a violation of Title VI requires finding of discriminatory intent still has not been finally decided by the U.S. Supreme Court (*see Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978); *Board of Education* v. *Harris*, 444 U.S. 130 (1979)), the U.S. Court of Appeals for the Second Circuit (the area including New York) has definitely held that such an intent finding is required. *See*, *e.g.*, *Lora* v. *Board of Education*, 623 F.2d 248 (2d Cir. 1980). Case decisions at the time (especially *Washington* v. *Davis*, 426 U.S. 229 (1976), at the least, indicated that the Board could mount a very plausible legal defense. However, the contrary legal conclusions in the Gifford Report (written by a non-lawyer) which did not give full credence to significant developments in the law and the intent/impact distinctions, were never apparently analyzed or reconsidered by the Chancellor's legal staff or the Corporation Counsel's Office.

51 See *supra*, Ch. 5.

52 His goals for the agency were to bring the nationwide complaint processing at OCR up to the court-ordered standards and then to focus on his (and Secretary Califano's) priority civil rights goals. He also thought that if major desegregation cases were to be brought against large Northern cities, the core issue of student integration rather than Gerry's secondary items, should be pressed. Tatel did, in fact, press a major desegregation case in Chicago. *U.S.* v. *Chicago*, _____ C _______ (E.D. Ill.).

53 Conrad Harper, offered similar comments concerning the backing he got from Califano and Tatel in Chicago. He mentioned one specific instance when the union "tried to approach Carter through the backdoor." Despite possible pressures from the White House, however, Califano and Tatel stood firm. After this confrontation, he said "the union took a dive, they just went away." Harper interview.

54 Letter, M. Rosen to M. Rebell, 2/16/81, at 3.

55 Feldman Interview.

56 Schonhaut Interview.

57 Flannery Interview.

58 Tatel Interview.

59 419 F.2d 1211 (5th Cir. 1969), rev'd in part on other grounds sub nom. Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970). (Singleton, of course, was a classic southern de jure segregation case.)

60 OCR had, of course, recently obtained agreements in Chicago and Los Angeles mandating specific staff integration ratios, although in both cases a disparity of approximately 10%, rather than the Singleton 5% standard, was accepted. (In Chicago, a deviation slightly in excess of 10% was agreed to for teachers, but the assignment of principals was to be in precise proportion to ethnic proportions in the system with no deviation.)

61 Letter, M. Rosen to M. Rebell, 2/16/81 at 3.

62 Rosen Paper at 58, 64 and 70.

63 While the Board agreed to the 5% standard as part of the compromise package, its negotiators still emphasized that the Singleton precedent, rooted in Southern de jure segregation, was not legally applicable to New York City.

64 Frederick Cioffi, a ranking career official with the Office of Education (who served as Acting Assistant Secretary for Civil Rights in the Department of Education during the beginning of the Reagan Administration) "cannot recall another

settlement where forced transfers were not part of the written agreement." Cioffi Interview.

65 After intense negotiations, the obligation in the first two paragraphs of the agreement to meet the *Singleton* standard was qualified by the phrase, "for each educational level and category." This qualification meant that racial integration standards would be calculated separately for elementary/junior high schools; for special programs in elementary/junior high schools operated by the central Board (*e.g.*, special education, and for the high schools).

66 Although this phrase was potentially ambiguous, the negotiators understood it to be a "word of art" in the education area, referring to such situations as the disproportionate number of Hispanic teachers that would have to be assigned to bilingual classes. Letter from J.H. Flannery, Jr. to Arthur Block, dated August 18, 1982.

67 Note, however, that because New York had a substantially lower complement of minority teachers than the other cities, a 10% deviation ratio in New York would have permitted all white faculties in many schools. (A 10% deviation from New York's 13% average minority teacher population would mean a permissible range of 3-23% minority teachers. By way of contrast, in Los Angeles where the basic minority integration was 30%, the 10% deviation ratio mean 20-40% minority teachers in each school.)

68 *See* pp. 339-340, *infra*, for a discussion of the chaotic experiences of these two cities in attempting to re-structure the system's entire teaching staff and to effect thousands of transfers in two months' time.

69 Rosen Paper at 66.

70 *See* *Caulfield* v. *Board of Education*, No. 77 C. 2155 (E.D. N.Y.), Transcript dated May 31, 1979 at 1959-1963 (Flannery); Transcript dated June 6, 1979 at 2000-2014 (Schonhaut). This much is clear -- the Board put forward statistics and projections which showed that faculty integration could be achieved in three years without forced transfers, and OCR was respectful of the Board's desire to meet the *Singleton* standards without resorting to involuntary teacher transfers.

71 Flannery Interview.

72 Tatel Interview. Flannery also states that he made a deliberate decision to recommend accepting Anker's oral commitment "without formalistic trappings" at the very beginning of the negotiations in order to make a "reciprocal gesture of good faith." Experience had taught him the importance of establishing "mutual reliability" for the overall success of a negotiation of this kind and for the good faith implementation of an agreement after negotiations were over.

73 Anker Interview.

74 According to Michael Rosen's written summary of the negotiations, "both the Board and HEW recognized that a certain number of involuntary transfers might be required to achieve the goals..." (Rosen Paper at 66). Like OCR, Rosen says that the key to dealing with the ambiguity of the text is that forced transfers were _not_ _excluded_.

OCR's position was simply "that the Board must commit itself to achieving the goals of the agreement through whatever devices were available and that since transfers were one such device, HEW could not approve an agreement in which the use of an appropriate device was forbidden. The means by which the agreement would be implemented was a matter to be determined by the Board, not HEW. HEW was only concerned with the results." Rosen Paper at n. 191. Rosen does not say that the Board anticipated or agreed to "wholesale transfers", as Anker put it, but he does say that some community school boards had already become eligible for ESAA grants and the UFT had indicated "its willingness to look the other way and give only token opposition," so the Board expected that a similar accommodation could probably be worked out with the UFT, if necessary, to complete compliance with the _Singleton_ standard in 1980. _Id_. at 65.

75 "4. The Board of Education will adopt and implement the following affirmative action procedures, and will sponsor and actively support state legislation at the next session of the Legislature where necessary to accomplish these ends:

(a) Any test used henceforth to determin whether a person is qualified for a teaching position in the system shall be validated prior to its being administered; except that in cases of demonstrable educational necessity, for example, where there are no eligible lists, a test may be used prior to its validation for temporary assignments, provided that validation shall be accomplished as soon as possible.

Tests shall be validated pursuant to accepted professional standards as exemplified in the Uniform Guidelines for Employee Selection Procedures (41 Fed. Reg. 51734, Nov. 23, 1976). Prior to the administration of any test, the Offic for Civil Rights shall have a reasonable opportunity to review and consult with respect to the design and implementation of the proposed validation.

(b) All existing eligibility lists by license shall be combined, and the names of all persons contained thereon shall be merged with the names of the persons who have passed any new tests, without regard to the dates of examinations.

(c) Rank ordering of persons who have passed examinations for the system shall be abolished.

(d) In employing and assigning teachers pursuant to these modified standards and procedures, the Board of Education will implement affirmative action mechanisms found to be appropriate, such as, for example, giving hiring preference to all eligible persons with prior experience in the system.

(e) In implementing such modified standards and procedures, the Board of Education will take all steps necessary to ensure fulfillment of the foregoing objectives throughout the system.

5. The Board of Education agrees that, in the event that the above-described legislation is not adopted so as to govern employment decisions for the 1978-1979 school year, the Board will seek appropriate litigation in support of the agreed objectives."

76 OCR required that the Board have Albert Shanker co-sign the agreement in order to commit the UFT to this legislative effort.

77 It was possible that Title VI violations would have to be based, instead, on proof of intentional discrimination under constitutional standards. *See* *Washington* v. *Davis*, 426 U.S. 229 (1976); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

78 Exclusive reliance on the NTE as a teacher hiring devise had been invalidated by the federal courts in *Walston* v. *City School Board*, 492 F.2d 919 (4th Cir. 1974); *Baker* v. *Columbus Municipal Separate School District*, 329 F. Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972); *Georgia Association of Educators* v. *Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976); *but* *cf*. *United States* v. *South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).

79 Flannery Interview.

80 Predictive, or "empirical" validation "requires an analysis of the relationship between performance on a test or other 'predictor' and performance on the job being tested for." Bartholet, "Application of Title VII to Jobs in High Places," 95 Harv. L. Rev. 945, 1018 (1982).

81 *See* 1970 EEOC Guidelines on Employment Selection Procedures, 35 Fed. Reg. 12333 (1970), codified at 29 C.F.R. Part 1607.

82 *See* 29 C.F.R. §1607.14(C)(1). (The Uniform Guidelines were first published at 43 Fed. Reg. 38, 290 [1978]. These guidelines were being negotiated at the time of the agreement, but the trend toward permitting greater use of content validation was evident in the temporary Executive Agency Guidelines in effect at the time. (*See* 41 Fed. Reg. 51744 (1976)).

83 "A test is said to be content-valid with respect to a job when it measures performance of tasks that constitute a relatively complete sample of those called for on the job." Bartholet, *supra* n. 77, at 1016.

84 Feldman Interview, Rosen Paper at 192.

85 Feldman Interview.

86 Feldman interprets "as exemplified" to mean that the Examiners could go on doing what they were doing already."

87 "6. The Board agrees, as soon as practicable to have performed a study of the relevant qualified labor poor by race, ethnicity, and sex by an independent expert acceptable to the parties and pursuant ot methodology and standards agreed to by the parties. Through the adoption and implementation of the affirmative action procedures and legislation provided in paragraph 4 of this Memorandum and other efforts taken or to be taken by the Board, the Board commits that by September of 1980, the levels of minority participation in the teaching and supervisory service will be within a range representative of the racial and ethnic composition of the relevant qualified labor pool.

It is understood that this commitment shall not require the Board to lay off any teacher currently employed by the Board or to hire any teacher who has not met appropriate requirements for employment, not inconsistent with this agreement. It is further understood that the commitment made herein does not establish quotas. Failure to meet this commitment shall not be considered a violation of this agreement if the Board demonstrates that is had implemented the provisions of this agreement in a good faith effort to meet the commitment made herein.

The Board had advised the Office for Civil Rights that the Board expects to consult with the United Federation of Teachers and others regarding the selection of the independent expert and the standards and methodology to be used in the above study. Likewise, the Office of Civil Rights has advised the Board that it expects to consult with other governmental agencies, civil rights organizations, and others regarding the selection of the independent expert and the standards and methodology to be used in this study."

88 Rosen Paper at 69; Flannery Interview.

89 Rosen Paper at 69. The acceptability of the agreement also was enhanced by its use of important

"buzz words" about quotas, the merit system, good faith and incumbent teachers' rights. At the last minute, the Board's Secretary/Counsel, Harold Siegel, recommended, as well, that the Board's commitment be referenced to the recent decision in Hazelwood School District v. United States, 443 U.S. 299 (1977), a Supreme Court decision which he read to bolster school board flexibility by permitting labor pools to be based on broader geographic areas.

90 Rosen Paper at 68 and ns. 170-171.

91 The final agreement dropped all reference to the instructional resources, coaches' pay and maternity leave issues. The following paragraph concerning affirmative action for female supervisors was included:

> "8. The Board of Education commits itself to pursue a program of affirmative action to increase the number of women in the supervisory service, including a plan to reach a system-wide level of participation by women within a range representative of the pool of individual qualified women by a date to be agreed upon with the Office for Civil Rights. The Board further agrees that it will establish a procedure whereby no person shall be appointed to a supervisory position until an affirmative action officer in the central personnel administration has studied the file of applicants for the particular position and determined that the appointment process demonstrates good faith compliance with the affirmative action plan. The Board agrees to review with the Office for Civil Rights the appropriateness of standards and procedures for selection of supervisory personnel to insure conformity to this paragraph."

92 Senator Javits did not get as deeply involved in the political uproar surrounding Senator Moynihan's comments. He did, however, at one point make a speech on the Senate floor defending the Agreement. Although Anker generally supported Moynihan's remarks, another high Board official involved in the negotiation was extremely disappointed in Moynihan's reaction, not only because of its hindrance to implementing the agreement, but also

because Moynihan's staff had implicitly "cleared" it after being kept well-informed about the negotiations.

93 449 F. Supp. 1203 (E.D. N.Y.), *aff'd in part, rev'd in part and remanded*, 583 F.2d 605 (2d Cir. 1978); *on remand*, 486 F. Supp. 862 (E.D. N.Y. 1979), *aff'd*, 632 F.2d 999 (2d Cir. 1980).

94 The UFT's intervenor complaint did not contest the validity of those provisions in the agreement that the UFT had "co-signed under protest." Nor did the UFT agree with the plaintiff's claim that ethnic surveys were unconstitutional. The UFT did join, however, in the central challenge to the faculty integration provisions. Still, the UFT probably would not independently have gone to court at that time to contest those provisions, but rather, would have waited to see how they worked out in practice. The *Caulfield* complaint had made it necessary for them to intervene to be involved in decisions that would effect their membership. Feldman Interview.

95 The American Jewish Congress and the Anti-Defamation League of B'nai Brith participated as *amicus curiae* supporting plaintiffs. The defendants were the Board of Education, HEW, and the State Commissioner of Education.

96 In January, 1977, the central board and sixteen community school boards filed a total of 32 applications with HEW for ESAA grants. When the Office of Education reviewed these applications for quality and funds availability, it tentatively approved 26 grants totalling approximately $17.5 million. These funds were held up, however, by OCR's determination that alleged violations cited in OCR's first letter of findings disqualified all of the New York City districts.

On October 25, 1977, the central board received formal notification that notwithstanding the agreement, it was still ineligible. However, almost all of the community school districts applications now were deemed eligible because the districts had agreed to plans which would immediately bring about faculty integration in the schools within their jurisdiction and HEW, therefore, provided them with $13.5 million of the reserved funds.

The Board filed a complaint in Board of Education v. Califano on September 27, 1977. On November 18, 1977, Judge Weinstein issued a decision rejecting the Board of Education's key contention that because it was not found guilty of intentional discrimination, it was not responsible for racially disparate teaching assignments, but also finding that HEW had unjustifiably refused to consider in its administrative hearing certain evidence offered by the Board. He remanded the case to HEW. After further administrative factfinding, OCR adhered to its original determination. Judge Weinstein then considered the Board's challenge on its merits and ruled in favor of HEW on April 18, 1978. This order was affirmed by the Second Circuit (584 F.2d 576 (2nd Cir. 1978)), and then by the United States Supreme Court (Harris v. Board of Education, 444 U.S. 130 (1979)), in a major decision which held that Congress intended eligibility for ESAA grants to be based on a discriminatory impact standard.

The Board was more successful with the remaining question of the standards for granting waivers of ineligibility. In a separate case, based on the ESAA funding cycle for 1978-79, the Board eventually won a court order declaring that HEW was not legally prohibited from granting (in its discretion) a waiver of ineligibility if an agreement has been reached "terminating all active discrimination and beginning prompt elimination of the results of past discrimination [even] where the effects of past discriminatory teacher assignment have not been fully eliminated." Board of Education v. Califano, 464 F. Supp. 1114, 1127 (E.D.N.Y. 1979), aff'd, 622 F.2d 599 (2d Cir. 1979), cert. denied, 449 U.S 1124 (1981). Accordingly,, the matter was remanded to HEW for further consideration. See also Board of Education v. Hufstedler, 641 F.2d 68 (2d Cir. 1981).

As a result of this lengthy and complex litigation process, at the end of 1981, HEW was still holding in escrow $3.5 million reserved from the 1977-1978 grants and $2.36 million reserved from the 1978-1979 grants. (These funds would have been awarded to other school districts had not the Board promptly brought suit and obtained court orders freezing the funds). Under the ESAA decisions, Board of Education v. Harris, 622 F.2d 599 (2d Cir. 1979) and Board of Education v. Hufstedler, 641 F.2d 68 (2d Cir. 1981), HEW was to decide whether the Board of Education demonstrated for the relevant time periods "that the applicant has ceased its disqualifying activity and has provided acceptable assurances that such conduct will not reoccur." Id. at 70. In 1982, HEW approved the waiver and released the escrowed funds to New York.

97 Even still, the Chancellor had to exercise his authority under N.Y. Educ. Law §2590 to suspend Community Board 26 to ultimately have the racial census conducted in that district.

98 449 F. Supp. 1203, 1206-7.

99 Caulfield v. Board of Education, 583 F.2d 605 (2d Cir. 1978). The Court held that Title VI's "statutory scheme requires a hearing with notice only when HEW seeks fund termination" (Id. at 615). The Second Circuit also affirmed Judge Weinstein's order denying plaintiff's motion for an injunction against the ethnic surveys. The Caulfield trial was held April to June, 1979. Judge Weinstein issued a decision finding the Agreement lawful on its merits. 486 F. Supp. 862 (E.D. N.Y. 1979), aff'd, 632 F.2d 999 (2d Cir. 1980).

100 Chancellor Anker had not submitted the plan when it was due in January, 1978.

101 New York City Public School System, "A Progress Report and Plan to Implement the Memorandum of Understanding Between the New York City Public School System and the Office for Civil Rights, United States Department of Health, Education and Welfare" (December 15, 1978).

102 Letter from Lloyd Henderson to Frank Macchiarola, April 10, 1979. That OCR took four months to respond to what OCR iself later called a vague plan is typical of the erratic pattern of OCR's communications with the Board of Education during this period.

103 Letter from Chancellor Macchiarola to Lloyd Henderson, March 30, 1979.

104 An analysis prepared for OCR by the Delta Research Corporation in June, 1980 indicated that 2,250 elementary and 1,050 junior high school teachers would need to be moved to achieve full compliance. (No figures were presented for high schools).

105 Chancellor Macchiarola had met the previous August with the newly-appointed OCR Director, Cynthia Brown. He explained that the Board had taken all reasonable steps short of mandatory transfers (including promoting voluntary transfers and monitoring community district "excessing" policies for integrative effect) and that to compel mandatory transfers at this time would cause massive disruption and would be particularly harmful to black faculty and students.

The Board's basic position was that at the time it entered into the Agreement, it reasonably believed that its goals could be achieved by regulating the natural flow of teachers into vacancies in the system. The Board had planned on hiring substantial numbers of new employees over the next few years, but instead it had frequent lay-offs. Another key problem was that when the Board attempted to fill vacancies by recalling previously laid-off teachers, job offers were declined in large numbers. Former teachers had lost interest in employment in the city school system altogether or else would not teach in certain "bad neighborhoods." (The Board reported, for example, that in order to fill high school vacancies in the Fall of 1979, there were many areas in which ten teachers would be assigned before one would accept the job.) Since these refusals in most cases caused a prospective teacher to be stricken from the eligible list, these declinations, according to the Board, caused the system to lose "thousands of teachers, mostly white ones".

The Board also claimed additional obstacles to teacher integration could not be overcome by resorting to mandatory transfers. These included shortages of teachers in license fields such as math and science, objections by minority parents to losing the services of experienced minority regular substitutes, and refusals of assignments.

The Chancellor had also continued to experiment with new techniques for increasing faculty integration. He adopted a regulation -- the "80-20-80 formula" -- which limited by race the prerogatives of community school districts to hire teachers under the Decentralization Law's alternative appointment system. He also made an attempt to limit teacher transfer rights under the union contract, but was overruled by a labor arbitaration (which he did not appeal). Opinion and Award, American Arbitration Association Case No. 1339-0485-80. Other initiatives were the creation of a "district teacher reserve," and directives involving permanent re-assignments and "temporary" appointments of regular substitutes in the community school boards.

106 No. 77 C. 2531 (E.D.N.Y.).

107 Letter from Frank Macchiarola to Clarence Thomas dated July 9, 1981.

108 See New York Times, June 3, 1982, p. 1, col. 1; June 10, 1982, p. 1, col. 1.

109 Memorandum of Understanding Between the Board of Education of the City of New York and the Office for Civil Rights, United States Department of Education, November, 1982 (hereinafter the "1982 Agreement"). See New York Times, November 24, 1982, p. 1, col. 1; November 28, 1982, p. 6E, col. 6; December 8, 1982, p. A-30, col. 1 (editorial).

110 "Each school in the New York City public school system shall reflect, within a range of 15 percent, the racial/ethnic composition of the school system's teacher corps as a whole, at both district and high school levels, to be determined on a borough-wide basis." (emphasis added) Affirmative Action Plan annexed to 1982 Agreement at p.2. Cf. note 66, supra.

111 See note 67 supra.

112 Interestingly, however, the Chancellor did initiate a federal lawsuit against the Board of Examiners in August, 1981, charging that the tests they had recently administered for supervisory positions were racially discriminatory and not valid. Macchiarola v. Board of Examiners, Docket No. 81 C. 4798 (SDNY). This suit was settled, at least tentatively, in July, 1982, by an agreement on methods for developing new tests.

113 The Board transmitted its expert labor pool study to OCR in December, 1979. However, OCR's own expert consultant, Stephan Michelson, had been extremely critical of the Wolfbein draft labor pool study and was likely to reject the final work

product as well. OCR merely reported that its review of Wolfbein's report still was pending.

114 Interview with James Meyerson, Esq., January 24, 1983.

CHAPTER SEVEN

THE NEW YORK REVIEW: STUDENT SERVICES ISSUES

The original focus of the New York Review was on relatively novel theories of discrimination. The plan was to use statistical methods of proof (which largely reflected a result-oriented approach toward educational equity issues) to uncover discriminatory patterns in the allocation of educational resources, classroom segregation of minority children and racial disparities in the application of disciplinary rules.

However, as discussed in the previous chapter, in 1976, the focus of the Review shifted abruptly towards more traditional allegations about employment discrimination.[1] Indeed, the very issues Gerry had originally hoped to soft-pedal -- if not avoid entirely -- came to dominate the negotiations and the process of implementation. The double irony of this turn of events is that when OCR and the Board finally returned to the original, and conceptually more knotty, student services issues, an agreement was reached quickly and the settlement of the most disputed area (ability grouping in primary grades) left both parties largely satisfied. This chapter will trace the history of this second New York City agreement.

I. THE INVESTIGATION

A. The Second Letter of Findings

Martin Gerry's letter of findings on the employment issues was sent in November 1976, just after the Ford Administration had been defeated at the polls. Between the election and the Inauguration, Gerry and his special New York City Review staff worked on a crash basis to prepare their follow-up letter on the student services issues. When finally issued on January 18, 1977, on the eve of the change in administrations, the 29-page document represented the culmination of Gerry's efforts and a swan song attempt to demonstrate a mastery of school practices in this enormous, educational labyrinth. Using statistics, qualitative findings and anecdotal information to describe dozens of problem areas in the system, the second letter built the case for Gerry's central theme -- minority and non-minority students received educational resources on separate "tracks."

According to Gerry, minority children going through the New York City School system experienced discriminatory treatment at every turn. For example, in comparison to the experience of a white child, a black child typically would begin his schooling at an elementary school that was in worse physical condition and had fewer or lower quality teaching materials and equipment; he would be taught by teachers with less experience; overall, there simply would be less money per pupil hour allocated to this school. Even when a school as a whole was racially integrated, a black child was likely to find himself in a segregated "low track" class because of his poor reading score, (he was not, however, likely to be given significant remedial reading instruction in this class). In addition, minority children were plagued with discriminatory patterns in guidance services and in disciplinary penalties.

The specific allegations that comprised this general picture of a tracked system were as follows:

1. Denial of Equal Educational Resources.[2]

Growing out of the first and largest section of Gerry's original "Issues Outline," the comparability section of the second letter concluded that New York's resources were so maldistributed as to virtually constitute a "dual school system." Among other things, Gerry charged that less qualified staff were assigned to minority schools; per pupil instructional salaries at the high school level were 15% greater in predominantly non-minority high schools than in minority schools; the quality and condition of high school science laboratories, audio-visual equipment, text books and basic school buildings were inferior in predominantly minority schools. Furthermore, minority students allegedly had fewer opportunities to be taught in individualized settings, to enroll in junior high school level "special progress classes", and to obtain diverse and advanced placement high school curricula offerings.

2. Denial of Meaningful Educational Services.[3] Focusing on the elementary schools in the system that had sufficient numbers of minority and non-minority children to make classroom integration possible, OCR found segregated classes or groupings in 204 schools (approximately 20% of the schools in the system). In 59 of these schools, there was no indication that the segregated assignment patterns were related to ability groupings. In the remaining 146 schools, where ability grouping was the purported rationale, OCR asserted, based on "information provided by classroom teachers," that "criteria to place minority students in low ability groups are often both vague and subjective."[4] Furthermore, when supposedly "objective (qualifiable) criteria" were utilized, they often were applied inconsistently or inappropriately.[5] Finally, the letter argued that the segregated groupings were detrimental educationally, since low ability (predominantly minority) tracks neither appeared designed to remediate academic efficiencies nor, in fact, achieved any successful remediation.[6]

3. Restriction of Educational Alternatives in Secondary Programs.[7] Based on OCR's special on-site surveys and investigations, it was alleged that the system utilized counseling and course enrollment procedures that channeled minority and female students to lower level and stereotypical

courses, and non-minority students to special progress classes, and elite academic high schools. Moreover, it was alleged that minority students had many fewer guidance counselors serving them, and that non-English speaking children had virtually no guidance counselors who spoke their language.[8]

4. Discriminatory Discipline Practices.[9] Analyzing 21,000 reported student suspensions during the school year 1974-75, the letter found a "pervasive practice of punishing students on the basis of race and ethnicity." Specifically, it concluded that minority students, on the basis of their race or ethnicity; "(1) have been disproportionately punished more often and more severely for the same offense and (2) have, through the discriminatory application of the suspension sanction, been kept out of school more often and for longer periods of time than non-minority students." (There was no discussion of the alleged causes for this discrimination other than to say that it is "facilitated by the school system's failure to clearly delineate the severity of the punishment to be applied for a particular offense.")

B. The Withdrawal of the Second Letter

Martin Gerry held a press conference on January 18, 1977, to announce the issuance of the second letter. He informed the press that:

"Yesterday, I met with the Chancellor Irving Anker

> of the New York City school system to advise him of my conclusion that the school system is violating civil rights laws which prohibit discrimination against minority, female and handicapped students."[10]

Chancellor Anker reacted angrily to the substance of the letter and to Gerry's method of releasing it. Gerry, he said, was "headline hunting", and his report was filled with the most egregious sophomoric errors."[11] Anker's angry comments apparently fell on sympathetic ears among the OCR officials who remained after Gerry's departure. Albert Hamlin and Lloyd Henderson were career officials at OCR who, between them, had more than 20 years of experience in federal civil rights enforcement. Neither man had been part of the New York City Review project but they both had become concerned during the frantic concluding days of Gerry's directorship that the student services letter was being issued in haste and that it may not have been up to normal agency standards.[12]

Now that he was Acting Director, Hamlin was in a position to have the situation scrutinized more carefully. He set in motion an "independent review" of the second letter.[13] Participating in this process were (a) OCR staff from the national headquarters and from the regional offices in New York and Chicago; (b) HEW's Office of General Counsel; (c) J. Harold Flannery, the private attorney who later would be called upon to conduct the negotiations and (d) various interest group representatives who were consulted informally. The key problem that surfaced during this reconsideration was that the New York task force had not assembled an adequate internal portfolio of evidentiary materials corresponding to the findings. (Preparation of such a packet was a standard OCR procedure in order to assure that admissible evidence would be available for Court proceedings, and OCR normally maintained a careful chain of custody tracking the observation; recording; compiling and analysis of data.) In addition, the letter on its face suggested methodological problems and soft data in regard to a number of findings. Finally, the heavy statistical approach of the entire investigation was inconsistent with recent legal trends, notably the Supreme Court's decision in Washington v. Davis,[14] which seemed to presage increasing judicial emphasis on intent.

There were three choices: To proceed with the letter despite its deficiencies; to abandon it altogether; or to withdraw it in its current form with the intention of revising it. Hamlin was leaning heavily toward withdrawal by March 1977, and a final decision was reached in May with the participation of OCR's new Director, David Tatel. Hamlin explained the withdrawal to Chancellor Anker and, in order to avoid violation of the time deadlines in the Brown order, he secured the consent of plaintiffs' attorney in that case.[15]

Tatel placed much of the responsibility for the content of a revised letter of findings upon a team of investigators borrowed from the OCR's Chicago regional office. The team was given computer support through a special contract with Delta. Besides tracking down the data sources used by Gerry's special task force, the investigators attempted to learn about he New York City school system's operations. They asked for help from Advocates for Children, the Public Education Association, and other local groups. These groups cooperated but they also were suspicious. They feared that the reconsideration might be a cover to bury OCR's findngs of discrimination in student services (and perhaps also OCR's employment discri-mination findings.) Informal communications from former members of Gerry's Task Force fed these suspicions.[16]

C. The Revised Second Letter.

The revised letter of findings on student services issues is dated October 4, 1977. The manner in which it was released, as well as its context, differed from Gerry's original letter both in style and substance. Despite close involvement of Washington personnel, the revised letter was issued through routine channels, in this case by Acting Director William Valentine of the regional OCR Office in New York. Gerry had held a press conference, Valentine did not. Gerry had charged the Board with discrimination in every area he addressed, and said that the Board foreseeably had created a system that was pervasively "tracked" along lines of race, national origin, and sex. The revised letter did not accuse the Board of overall discriminatory design. Rather, it expressed varying degrees of concern or suspicion that violations have occurred but withheld judgment pending receipt of further information. Whereas Gerry made a blanket demand for submission of plans to remediate alleged violations, in the revised letter OCR specifically enumerated under each category a combination of requirements for remedial plans and/or further information, explanation or monitoring.[17] (Different statistical methods were used, but in the major areas that were pursued, Tatel's statistics reached conclusions of violations similar to those reached by Gerry.[18])

In terms of its substance, the revised letter totally abandoned one of the major initial Big Cities Review issue -- denial of equal educational resources -- as well as all allegations of discrimination based upon sex.[19] Classroom segregation now became the main concern[20] and new emphasis was also placed on compliance with the requirements of Section 504 of the Rehabilitation Act.[21] (Gerry had broached this topic but had not pursued it in detail because regulations implementing 504 had not yet been promulgated when his letter was prepared).

The findings about classroom segregation were clear and disturbing. At least 75,000 students were in racially identifiable/isolated classes (constituting 19.9 percent of 9.994 classes) without any apparent justification for why they could not be educated in integrated settings.[22] A second classroom segregation issue involved instructional grouping of blacks and hispanics in predominantly minority schools. Looking at 7,887 of these classes, OCR found that 23% of them were identifiably black or Hispanic in schools where integration among these groups apparently was feasible. OCR concluded through statistical analyses that neither the minority/majority racially identifiable classes nor the black/hispanic identifiable classes could have occured by chance alone given the student composition of the pools from which these classes were organized.

II. The Negotiations

A. The Setting

The timetable for the student services negotiations largely was determined by the attorneys and judge in the Brown case[23]. Anticipating Brown deadlines, the revised second letter had called for a response from the Board in 45 days. On November 22, 1977, the Board submitted a partial response, but it also requested clarifications and data from OCR in order to respond more fully on a number of points. In mid-December, OCR convinced the plaintiffs' attorneys in Brown to consent to extending until March 1, 1978 OCR's deadline for an agreement with the Board or, absent such agreement, for commencing enforcement proceedings.

On January 18, 1978, the Board supplemented its November response, and OCR replied to the Board a week later. At least two other submissions were made by the Board in the first half of February. Also, at this time negotiations began.

When the March 1st deadline came, the parties had entered into active negotiations, but no agreement had been reached. On that date, Tatel sent Anker a letter saying that OCR was referring the matter to HEW's Office of General Counsel for consideration of a course of action. Despite the court deadline, the Counsel's Office did not begin administrative enforcement proceedings. Learning of this fact three weeks later, the plaintiffs' attorney in Brown sent the general counsel a terse warning that HEW could be found in contempt of court.[24] By this point, Tatel was ready to declare an impasse and to recommend to Secretary Califano that enforcement be commenced. Tatel met with Anker on April 3, 1978 to try one last time to break the deadlock. The meeting failed, whereupon HEW issued a formal Notice of Opportunity for Hearing,[25] which would commence an administrative proceeding to cut off funding to New York City. However, before the proceedings actually got under way, subsequent talks broke the impasse, resolved the outstanding issues and a settlement agreement on the student services issues was signed on June 23, 1978.

B. The Bargaining Process

"The employment negotiations started out easy and became difficult, whereas the student services negotiations were just the reverse," recalls OCR's chief negotiator in both instances, Nick Flannery. There were important substantive differences as well. On the employment issues, there was relatively little debate about legal positions, basic facts or educational policy. There was a consensus that certain conditions existed that were undesirable (whether or not they were illegal as well) and the negotiations were a tug-of-war on how extensive the remedies would be.

The student services negotiations, by way of contrast, was a continuing dialogue on the basic facts, critical educational policy issues, legal requirements and, finally, specific remedies. The flow of reports and documents between the parties and the negotiating sessions themselves became a process of investigation, analysis and argument, including head to head debates on educational policy issues. But at the end of this process, when the student services agreement was signed, neither the Board, the UFT nor any politician was heard to complain that the Board accepted tough remedies only because it had a "gun to its head." Rather, the process had raised new levels of understanding on the issues. Schonhaut and other representatives of the Board[26] saw the agreement as one that probably would bring about some improvement in educational practices and, in any event, as one with which they could live.

There were approximately seven meetings (totallying about 50 hours) between the Board and OCR representatives prior to David Tatel's April 3 meeting with Chancellor Anker. Relatively early in this process, the parties agreed on the principles for settling (or postponing) all of the issues that OCR had raised, except for classroom segregation.

The most debated issue in the early negotiations was discipline. In Flannery's view, OCR had an "irrefutable case" and he could only understand the Board's resistance as an effort to protect its teachers and administrators from further paperwork requirements and protocols. Schonhaut, on the other hand, stated that there were serious questions as to whether the statistical disparities really were caused by discrimination. The result of this debate, in any event, was not a strong corrective remedy or a new discipline code, but rather a "triggering device" -- the Board would be required to keep racially identifiable records on all student suspensions -- which was intended to effectuate OCR monitoring and to make school principals "think twice" when recommending that a minority child be suspended.

In the remaining area of classroom segregation, the Board's initial stance was to try to rebut OCR's allegations. The Chancellor investigated the pertinent facts regarding each one of the 3,790 classes that allegedly were racially identifiable or isolated in October, 1975, and summarized the responses in several pages of charts which claimed that "in 96 percent of the cases cited by OCR, the classroom situations were in accordance with either legal requirements and/or valid educational practice."[27] OCR accepted the Board's argument that almost half of the statistically identified segregated classes were caused by placement of hispanic students in bilingual settings pursuant to the Federal Court decree in the Aspira case.[28] But it stood firm on challenging the remaining assignments, including those purportedly based on ability grouping practices.

The Board's legal position was that racially isolated or identifiable instructional settings would violate Title VI only if they were caused by intentionally discriminatory actions. Then, relying on its own independent survey of classroom organizations, it said that there were indeed, a small number of instances of unlawful segregation. These amounted to 4% of the classes listed by OCR as racially isolated/identifiable. But the Board said that the other cases listed by OCR reflected errors or could be justified. The Board committed itself to eliminating the ad hoc practices that accounted for the 4%, but it denied the need for any policy change regarding the rest.

According to Flannery, OCR then tried to convince the Board's representatives to look more closely at the actual classroom assignments and to reconsider their legal and educational validity. Aided by representatives of local advocacy groups with whom they conferred informally, OCR staffers prepared questions about particular schools or particular practices to be looked at in more detail. In preparing answers to these questions, Schonhaut consulted not only with the Board's central staff, but he also assembled an informal advisory group of community district superintendents from five districts with a spectrum of student racial compositions. According to Flannery, this process revealed a much more pervasive pattern of undisputedly invalid practices than the Board had recognized. Kindergarten or first grade children were often assigned to classrooms based on whether they could tie their shoes or tell time; older children were sometimes given classroom assignments based on bus routes, which, of course, corresponded to neighborhoods and ethnicity. The negotiators agreed to work jointly on ways to prevent such clearly indefensible practices from reoccurring.

Other issues proved more knotty, especially the question of whether reading scores validly could be used to group children in self-contained classes in which all subjects are taught. Although the Board contended that such ability groupings were educationally desirable, their main argument was feasibility. The professional educators who represented the Board vigorously asserted that the system's teachers simply would not be able to delivery quality instruction if principals did not have the option to organize classrooms based on ability tracks.[29] OCR's lawyers did not have a good answer. In mid-May, an impasse developed on these basic ability grouping issues.

A decision about how OCR would proceed now had to be made at the highest levels. Accordingly, Tatel prepared a comprehensive briefing memo for Secretary Califano. In his introduction, Tatel put the EES review and the negotiations into this perspective:

> "The segregated classroom issue is not an abstract civil rights problem. New York's tracking system is destroying the educational opportunities of thousands of black children. It makes no educational sense and can be easily corrected without busing, goals, collection of ethnic data or any other unpopular devices. It is precisely the kind of urban school problem on which OCR should concentrate during the next few years.[30]

Tatel characterized the Board's factual responses as "a virtual confession of uncontrolled tracking with the foreseeable result of producing segregation."[31] He found most objectionable in the Board's remedial proposal its desire to continue ability grouping of kindergarten and first grade children based on dubious "indicators" and to maintain all day "tracking" in grades 2 through 8.

Tatel informed Califano that OCR's position, based on Department regulations, was "more moderate" than the requirements that some courts had imposed in this area. He noted further that OCR's position "adheres to prevailing educational views concerning the proper uses and limitations of racially-defined grouping as explained in two recent NIE [National Institute of Education] publications."[32] Finally, Tatel recommended that if he could not substantially change the Board's position in a meeting with Anker, OCR should begin administrative enforcement proceedings.[33]

Califano authorized the commencement of enforcement proceedings. But he also had an idea for breaking the impasse at the negotiating table. He contacted his appointee to the Directorship of the National Institute of Education, Dr. Patricia Albjerg Graham, and asked her to act as an advisor to the OCR lawyers.

Graham saw her role as "brokering the question of what is possible." Once could hardly imagine a person better qualified for this task. She was a former teacher who went on to earn a Ph.D. in American History in Columbia University, concentrating on the history of education. From 1965 to 1974 she had run a teacher training program at Barnard College, which kept her in daily contact with the problems of teachers in the New York City school system. She had administrative experience as a former vice president of Radcliffe College an now, as Director of NIE, she was to be responsible for setting the federal government's research agenda in matters of learning, educational policy and school governance.[34]

Graham had not previously thought of ability grouping as a civil rights problem, but she had observed the tracking practices in New York City and found that minority children were placed disproportionately in lower tracks and stayed there "forever". The gaps between upper and lower tracks widened and teachers assigned to lower ability groupings did not feel they had the same obligations to show educational results as did teachers in the higher tracks. She believed there were no acceptable criteria for organizing entire classrooms in the primary grades on the basis of ability. Moreover, her understanding of the relevant research was that there was no evidence that homogeneous groupings actually improved learning in the elementary grades among children within normal ranges of intelligence.[35]

Schonhaut said he agreed with Graham on these research findings. He emphasized, however, evidence indicating that teachers and administrators resisted efforts to make them teach more heterogeneous classes. If compelled to accept heterogeneous groupings, teachers rarely provided the individualized work arrangements needed to assure success in such settings.[36] According to Schonhaut, ability grouping had been practiced for many years even in virtually all minority schools and the most successful programs were highly structured.

Graham and Flannery were quick to point out to the Board's negotiators the inconsistency of having argued in the employment negotiations that the teacher licensing and selection system was essential for maintaining a highly qualified teacher corps and arguing now that these same teachers were unable or unwilling to teach heterogeneous classes. Nevertheless, OCR had to deal with the reality that New York was not only the biggest but probably the most tracked major school system in the country. (In Graham's words, New York City was "deeper into the hole and the hole was bigger.") The stage was set for a compromise.

C. The Final Agreement

A compromise was finally reached by distinguishing between two basic kinds of ability grouping: the organization of entire self-contained classes by ability; and creation of ability-based instructional units within a classroom. The key questions were: At what age level could each of these grouping practices be used? By what criteria must the ability groups be defined?

It was finally agreed that ability grouping at kindergarten level would be totally prohibited. At the first grade level, reorganization of classes would be permitted for reading and math instruction only. This limited ability grouping would be arranged in accordance with three criteria set forth in HEW's ESAA regulations: grouping had to be based on objective criteria; involve no more than 25% of the students' school day; and there had to be special efforts to raise the performance of the lower ability tracks.[37]

Reaching an agreement on arrangements for the second grade proved more difficult. The Board sought extensive classroom groupings by ability for all children above first grade level. OCR was prepared to move closer to the Board's position starting at the third grade, but it stood by Graham's insistence that second graders were still too young to be for tracked. A settlement was reached by adoption of a new concept: second grade classes could be organized on ability criteria (if such grouping is "educationally compelled" and based on objective assessment criteria) provided the group is "stratified, non-continguous or bi-modal". This meant that if a principal wanted to organize a grade into ability groups, each classroom had to combine "at least two distinct ability groups" reflecting a diverse range of abilities.[38]

With the second grade issue resolved, settlement was quickly reached for grades 3-9. Here the parties accepted a version of the Board's March offer, with some additional safeguards. Classwide ability grouping would be limited to three categories per grade and classes within each category must reflect the minority/non-minority population of students in that category. Selection would be based on recognized objective, non-discriminatory instruments such as standardized reading tests, but for mathematics instruction "categories were to be reorganized based on recognized objective non-discriminatory mathematics tests." (emphasis supplied) It was also agreed that "teacher judgment" could supplement the objective tests wherever such judgment would result in greater integration. This reflected OCR's (especially Flannery and Graham's) belief that teacher judgment, if free of bias, was potentially the best means for grouping students.[39]

In sum, the agreement between the Board and OCR on racially identifiable/isolated instructional settings is exceedingly complex and difficult for the public -- or the system's teachers and administrators -- to understand. Requirements differ by grade level. Distinctions among and within the sets of requirements frequently depend on undefined terms (e.g. "educationally compelled") or on heavily loaded technical language (e.g., "objective reviewable non-discriminatory criteria"). Important areas of variation in the basic requirements are permitted so long as they are approved by school officials based on "documentation".[40]

The sheer complexity of the agreement raises immediate questions about feasibility of implementing it. However, if the agreement were fully implemented, it would accomplish the following:

First, what was formerly probably the most tracked school system in the country now would eliminate homogeneous grouping of kindergarten or first grade classes and minimize the practice for grades 3-9. Second, the agreement would eliminate inappropriate use of tests, particularly standardized reading tests. Third, it allowed leeway for teacher judgment wherever it would have the incidental effect of increasing integration. Finally, and perhaps most importantly, the investigation caused high level Board officials to reconsider deeply ingrained practices and assumptions about the effectiveness and fairness of multi-level ability grouping. The Board recognized and began correcting segregatory practices which it readily acknowledged to have no educational justification (e.g., organizing classes by bus routes). And it took on a serious commitment "to implement special efforts to raise the achievement level of students in the lower or lowest achievement groups" when the groupings are racially identifiable.

The negotiations of the student services issues were not conducted under pressure of drastic, imminent sanctions against the Board, as had been the case with the employment negotiations where CETA and ESAA grants hung in the balance. Deferral of funding applications amounting to $44.2 million for New York would need to be considered if no agreement were reached by the summer, but Tatel had set a tone with the Board of fairly consistent optimism that deferral and the threat of a basic cut-off of Title VI funds would be avoided.

OCR's moderate position was undoubtedly influenced by Flannery's assessment that New York City did not provide an ideal legal setting for extending the Southern precedents on ability grouping practices. There was more reason for OCR to be concerned in this second set of negotiations that its position might not prevail in court.

Of perhaps greater immediate concern, however, was OCR's awareness that implementation was the overriding issue in these negotiations. Ability grouping was such a complex and difficult activity to monitor that achievement of significant gains for minority children was highly dependent on serious acceptance and commitment by the Board of any requirements it formally adopted. In various ways, Schonhaut continued to remind OCR that it could not accomplish much by the promulgation of a "Volstead Act".

Although there was a certain amount of resentment on OCR's side about the Board's continual allusion to feasibility arguments, nevertheless OCR had to give weight to the idea, as Flannery put it, that "perception can be reality." That is, if the school system believed that it was signing an agreement it could not live with, infeasibility would become a self-fulfilling prophecy.[41] Flannery suggests that the exercise of forcing the board's negotiators to come up with detailed descriptions of the practices that caused disproportionate statistics persuaded them to agree to more remedial changes than they would otherwise have accepted. Schonhaut for his part, says that the negotiating process educated OCR to the workings of the system and exposed the inappropriateness of much of its position. In the final analysis, Schonhaut says, the agreement was as strong as it could be. Flannery, on the other hand, has lingering doubts about whether more stringent requirements might have been feasible.

III. Compliance

Whereas the first agreement on employment issues, was quickly denounced by many teacher and civic groups, the student services agreement prompted angry reactions from the minority group interests. The Advocates for Children (AFC) organized a meeting a month after the Agreement was signed which was attended by representatives of about a dozen such groups. The impetus for the meeting was a memorandum Martin Gerry had prepared which had denounced his successors' settlement. "The letter of agreement," the memo began,

> "represents little more than a promise by the school system to comply with the law and a tacit acceptance by OCR of both the continued segregation of hundreds of thousands of minority children in low level ability groups and the continued disparate treatment of minority children under the student discipline system."[42]

Both in his memo and in an oral presentation at the meeting, Gerry particularly attacked the provisions of the agreement relating to racially identifiable instructional settings. He alleged that it was unprecedented for OCR to accept a plan that neither compensates for widespread past discrimination nor establishes meaningful procedures to prevent future discrimination.[43] Gerry's memo ended with a call to arms for the public interest bar:

> "The OCR-Board of Education letter of agreement sanctioning massive civil rights violations within the schools of New York City, if unchallenged, is likely to destroy much of the legal progress made in the last fifteen years to eliminate racial discrimination within the nation's schools. The agreement represents, in short, Plessy v. Ferguson at the classroom level with an added guaranty of curricular inequality."

There are no indications, however, that there was any substantial or sustained follow-up to this call.[44]

Since 1978, OCR's regional office has conducted somewhat routine monitoring of the classroom segregation and discipline provisions. In each area, a full yearly cycle of monitoring should have included the following phases:

1. Board of Education gathers school level data;
2. Delta Corporation processes data;
3. OCR forwards Delta report to Board;
4. Board responds to OCR regarding problem areas identified in the Delta report;
5. Through interchanges and meetings, OCR accepts explanations of statistical disparities and/or the parties agree on corrective actions.

OCR has never fully completed this anticipated annual cycle, although some years it has gotten further along than others. The high point was in the period from September 1979 to September, 1980,[45] when several communications were exchanged and OCR met both with Board staff and (separately) with minority group advocates to try to systemize its assessment of the school level responses and to obtain a better understanding of problems which might be indicated by the discipline statistics. The low point in monitoring was reached in the 1980-1981 school year when OCR did not even renew its contract for automatic data processing services; consequently data gathered by the Board of Education was never analyzed.

The statistical information which has been accumulated in the past few years, although perhaps not fully analyzed, still is informative. The numbers indicate that the agreement may have led to significant improvements in the area of classroom integration. At the same time, however, the discipline statistics indicate there may be wide-spread discriminatory patterns in student suspensions.

A. Ability Grouping and Classroom Segregation

The revised letter of findings on student services issues, had found that during the 1975-1976 school term there were more than 1,900 racially identifiable classrooms. According to the Delta report for 1978-1979, the first school year following the agreement, this number had been reduced to 365. In the following year, Delta reported a further decrease to 142.[47] Taken at face value, there statistics represent a dramatic decrease in within-school segregation. Nevertheless, surprisingly little attention has been paid to this area by outside organizations or the press. OCR's Regional Office has received few, if any, pertinent inquiries.[48]

These favorable statistics, of course, did not free OCR from its obligation to investigate the causes of the remaining suspected instances of racial isolation. It appears, however, that the Regional Office has not had the resources necessary to digest the voluminous and rather unsystematic reports prepared at the school level to justify the remaining isolated classrooms.[49] Its difficulties in this regard are, of course, exacerbated by the problem of an ever-changing educational environment. Because the original data is based on ethnic surveys conducted at the end of October, by the time the information is processed by the central board, sent to Delta, and tabulated, it will be April or May. Still later, when explanations are received from the schools about questionable patterns, the school year is over or nearly over, and instructional groupings have been disbanded. Obviously, this process does not allow time for follow-up visits by OCR or for application of specific remedies.

B. Discipline Practices

As noted above, the agreement on student services issues established a new reporting mechanism for student suspensions, which was set forth in a Board policy statement.[50] The statement explained that the Board and OCR would undertake statistical reviews of suspension data and "(w)here there is a disproportionate rate of suspension . .

an explanation will be required from the schools.[51] On a semi-annual basis, principals would record suspensions on the "School Tally Sheet and Report."

The first report generated under this system revealed marked statistical disparities. During the first semester of the 1978-1979 term, it was found that 126 junior and senior high schools and 61 elementary schools fell into the suspect range. In September 1979, the Chancellor sent a letter to officials responsible for suspensions in these 187 schools asking them to review the OCR data and to inform him 1) whether the statistics were correct and, 2) if so, why the disparities occurred. If the official determined that "the discipline policies and practices operational in the district at present might possibly produce discriminatory patterns of suspensions," then he was expected to provide a corrective plan.[52]

At the end of November, the Board sent OCR an official response to the first Delta report. The response took issue with OCR's statistical methoodology, complained that the explanatory information received by the Board from the community district and high school superintendents was "anecdotal and extremely comprehensive", and then described 10 main categories of responses.[53]

Suspension practices, unlike ability grouping, was an area of keen interest to local advocacy groups, particularly the Advocates for Children (AFC). At AFC's request, three of its staff members met with OCR's Regional Director Charles Tejada and members of his staff early in December 1979. Tejada gave AFC a copy of the Board's response, and criticized it as inadequate in several respects.[54] He explained, however, the limited leverage available to OCR so long as it was operating under the monitoring provisions of the Agreement, as contrasted with a compliance investigation or enforcement proceedings. Tejada invited AFC to provide further input in this area, and he reminded the AFC representatives that outside parties could act independently of OCR by bringing a private court suit.[55]

In January 1980, a regional staff person met with several Board staff members to try to bring to bear some of OCR's (and AFC's) criticisms of the Board's response. The focus of the meeting was to establish categories of acceptable responses to data showing disparate impact.56 Throughout this meeting and, in its correspondence with the Board, OCR never claimed that the suspension statistics established a legal violation. However, it insisted that its statistical methodology was valid under the Agreement as a triggering mechanism --if disparaties could not be explained adequately then the Board was obligated to take corrective action.

There is no record of any substantial follow-up after the January 1980 meeting. Required follow-up reports and data analyses were not systematically completed.[57] An additional complication was indecision in Washington. Martin Gerry had raised an uproar among state and local school officials in 1975, by issuing a national policy directive on reporting of disciplinary actions.[58] Ever since, discipline reporting had been "under a cloud" at OCR. When the Reagan Administration took office, with its philosophy of minimizing federal regulation, the discipline reporting issue was strongly put "on hold". Under these circumstances, OCR's New York Regional Office lacked policy guidelines and political support for following up problems that a complete analysis of discipline statistics in New York might reveal.[59]

1 In the other Big City Reviews locales, the original student services issues were also de-emphasized early in the game. In Chicago, teacher assignments and bi-lingual programming were intensely negotiated in 1977; after that, the other issues were dropped as OCR pursued broader student inter-school integration issues which culminated in the filing of a suit by the Department of Justice (U.S. v. Chicago, ____C_____ (E.D. Ill.)

In L.A., OCR Region IX consciously made a decision, at the outset, not to pursue any issues beyond faculty assignment and bi-lingual education (Palomino Interview). In Philadelphia, substantial analytic work was done on a variety of student services items. On some of these (faculty salaries, coaching, and discipline), OCR found no indications of discrimination; in other areas (resource allocation, ability grouping, handicapped placements), the local office was told to drop the investigation shortly before letters of findings were to be issued because the items had become "low priority"; in one area (curriculum offerings), however, successful informal negotiations (prior to the issuance of any letter of findings) solved the problem. (As in Chicago and L.A., bi-lingual education issues were formally pursued.) Wilson Interview.

2 Letter of Findings from Martin Gerry to Irving Anker dated January 18, 1977, at 3-10 (hereinafter "second letter").

3 Second letter at pp. 10-18.

4 For example, standardized achievement tests were heavily relied upon for assignment decisions even though they were "not intended to be used as diagnostic instruments." Furthermore, the use of self-contained classrooms meant that assignments made on the basis of reading test scores -- even assuming that these were valid indications of reading ability -- would determine a child's setting for instructional areas like math, science, art and physical-education which were not even purportedly covered by the grouping criterion.

5 Gerry's approach in this letter was to anticipate justifications the Board might advance and to refute them in advance. This anticipatory approach was unusual for OCR letters of finding.

6 Other alleged classroom segregation practices were the over-representation of minority children in

classes for children labeled as "emotionally handicapped," "mentally handicapped," and "educable mentally retarded," and the under-representation of minority children in "special progress" classes at the junior high school level.

Besides segregated institutional settings., an additional subsection under this heading alleged the denial of educational opportunity through language barriers.

7 Second letter at pp. 18-25.

8 On its face, OCR's evidence was a mixed bag. Some of the investigative survey responses seemed vulnerable to challenge. On the other hand, some simple and verifiable facts were quite striking as, for example, the allegation of completely unnecessary sex segregation patterns in vocational schools illustrated by the example of Queens Vocational High School where "8 of the 12 English courses...are single sex (100% male or female) and 4 are sex identifiable." Second letter at 24.

9 Second letter at pp. 25-27.

10 Press Statement by Martin H. Gerry, January 18, 1977.

11 New York Times, January 20, 1977, p.41, col. 1.

12 Although Hamlin and Henderson had different opinions on how seriously the letter was flawed, they agreed on one point -- OCR had to be prepared to prove the allegations of discrimination with evidence that would hold up in Federal Court. As Hamlin put it, "New York had a history of litigating."

13 There was some mention at the time of also taking a fresh look at the first letter, but it was decided that that document met agency standards in its formulation and its evidentiary back-up materials.

14 426 U.S. 229 (1976).

15 Apparently, OCR also sought the approval of Senator Javits' office. Memorandum, Hamlin to David Tatel, dated May 17, 1977.

16 Perhaps because of this atmosphere, perceptions of the competence and work product of the Chicago investigators in New York varied widely among our interviewees. Some offered the highest praise of their abilities, while others claimed that they never sufficiently understood New York City and dealt superficially with many serious allegations in the letter.

17 A good example is found in the discipline section, where OCR found a "prima facie" violation of Title VI. The section concludes with a request for:

> "1. an explanation, if any, for the findings of disparate racial impact of the District's present discipline practices;
>
> 2. a detailed, formal articulation of the District's present discipline policy together with specific information as to its dissemination;
>
> 3. a plan for a detailed nondiscriminatory discipline policy which will be implemented uniformly system-wide forthwith; and
>
> 4. a description of the record-keeping system you maintain or, in the event that a satisfactory system has not yet been formulated, a plan for maintaining records which will be effective as soon as practicable." Revised Second Letter at 10.

18 The statistics cited in the revised letter are not readily comparable to statistical references in the original letter addressing the same issues. Gerry made greater use of general statistical patterns; Tatel tried to highlight very glaring denials of services. Regarding classroom segregation, Gerry argued in terms of numbers of segregated grades, whereas, Tatel's unit of analysis was classrooms and, ultimately, children. Hence, Tatel concluded that there were at least 1,998 segregated classrooms shaping the educational experience of 41,182 minority students and 35,083 non-minority students. Revised Second Letter at 4.

Similarly, Gerry's analysis of the racial composition of special progress classes, and of the availability of bi-lingual guidance personnel were expressed in terms of overall ratios of minority under-representation, but Tatel focused on figures showing absolute denial of services to indentifiable children. Along these lines, the revised letter reports that over 80% of minority junior/senior high school students attended schools where there were no special progress classes, and that thousands of hispanics and Asian children with limited English language abilities attended schools where guidance counselors and/or disciplinary personnel who spoke their language were altogether absent.

19 The Lau issues, identification and curriculum for language minority children, do not appear but only because Chancellor Anker submitted a school system plan for services for language minority children in September 1977. "Plan to Comply with Title VI CRA also Submitted as Part of Application for Waiver of Ineligibility" (September 15, 1977).

20 Besides classroom segregation, four other Title VI issues emphasized in the letter were: accessibility of appropriate guidance and disciplinary services to national origin minority group children; discipline practices; availability of enrichment opportunities; and accessibility of bilingual psychologists and adequate psychological assessment instruments to national origin minority group children.

21 Five issues were featured: denial of educational services to handicapped children due to excessive waiting lists; shortened school day for handicapped children; inadequate evaluation and placement; failure to "mainstream" children, when appropriate; and inadequate identification procedures.

22 To maximize accuracy OCR had utilized figures only from schools where there were sufficient numbers of minority and non-minority children to make integration practicable; furthermore, it did not question the validity of the basic ability grouping structure; that is, racial segregation was considered only within each established ability level.

OCR had data on the student racial ethnic composition of 31,466 regular classrooms. By utilizing the above described methodology, it narrowed its examination to 32% of the broader sample. However, one limitation on OCR's analysis of its subsample was that OCR only controlled for four ability levels per grade when, in fact, many New York schools divided grades into many more tracks. OCR's methodology was based on the assumption that using more than four ability tracks in a single grade level rarely (if ever) could be justified educationally.

23 See pp. 143-144, 180, 225 note 4, supra.

24 Letter from William Taylor to Peter Libassi dated March 24, 1978.

25 In the Matter of the City School District for the City of New York, HEW Administrative Proceeding Docket No. 78-VI-4 (April 6, 1978). The Notice alleged two legal violations -- classroom segregation (Title VI) and waiting lists for handicapped children (Section 504).

26 For example, Chancellor Anker agreed that when statistical anomalies appear in a school's discipline practices, the principal should be required to explain them.

27 "Response to HEW Office for Civil Rights October 4, 1977 Letter of Findings" 6 (November 22, 1977) (hereinafter "November 1977 response"). The largest group covered by the explanation -- 45% -- were classes in which segregative patters were caused unavoidably by the requirements of bilingual education programs (Id. at 7). The next largest category, and the one that was to become the main focus of debates about educational policy at the negotiating table, were the 29% of racially identifiable classes that were allegedly organized by "ability grouping of pupils according to reading scores and other educational criteria." (Id. at 8).

28 Aspira of New York, Inc. v. Board of Education, No. 72 Civ. 400 2 (S.D. N.Y. Aug. 29, 1974). At first OCR had taken the position that the decree was being implemented in an unnecessarily segregatory manner. This argument also was made periodically by local advocacy groups.

29 OCR objected to these practices only to the extent that they caused racially identifiable (or isolated) instructional groupings. OCR clearly had no authority to insist on changes in ability grouping practices that were racially neutral in effect.

30 (Emphasis added). Memorandum from Director of OCR to Secretary of HEW dated March 24, 1978 at 1.

31 Id. at 4.

32 Id. at 7. The National Institute of Education (NIE) is a division of HEW (now of the Department of Education), which conducts and funds scholarly research, program evaluation and related activities in the area of education.

33 Tatel gave three reasons for preferring administrative enforcement to a referral to the Justice Department: (a) Negotiations could continue during preparation for the hearing; (b) Justice was overloaded with referrals in school desegregation matters prompted by Congress' anti-busing amendments; and (c) "it is important that we revitalize the administrative enforcement remedies that have remained dormant for the past 8 years." Id. at 10.

34 Graham is currently Dean of the Harvard Graduate School of Education.

35 Graham Interview.

36 Aside from the academic literature, Schonhaut reported that there was still a general belief among New York City educators that all children were better off if grouped by ability. This belief would shape teacher behavior whether or not it was supported in the scholarly studies.

Although it was agreed that there were no reliable standardized testing instruments for assessing ability at the kindergarten and first grade levels, the Board had argued for intra-class groupings based on non-discriminatory criteria such as reviewable maturity indicators, reading readiness levels, and ability to recognize symbols. "Suggested New York City Board of Education policy for integrating classes (OCR II)" attached as TAB D to Memorandum, Tatel to Califano, dated March 24, 1978.

37 See 45 C.F.R. §§185.43(c), 185.44(e) (1973).

38 For example, if a principal has four second grade classrooms and he wants to divide the grade into instruction groupings based on ability, then he must create a minimum of 8 sequential groupings.

This insures that no single classroom can consist merely of one ability group. Furthermore, contiguous groups may not be assigned to the same classroom. Hence, a classroom may consist of ability groups #1 and #4, or #5 and #7; but it may not be made up of groups #1 and #2; or #6 and #7. The idea is to guarantee a minimal amount of integration of children at different levels of functioning within each second grade classroom.

39 A comparison with the agreement reached in Chicago, the only other of the Big Cities where OCR raised this issue is instructive. The Chicago Agreement basically instructed principals to "insure that the racial ethnic composition of each regular classroom deviates no more than 20 percentage points from the racial composition" of the grade. If any such deviation does occur, the principal must reassign students or provide "an educational justification." The district was required to develop an internal mandatory procedure to evaluate the purported educational justifications, and it was to provide detailed reports annually to OCR. (Letter, Patricia Roberts Harris to Dr. Joseph P. Hannon, dated September 15, 1979, Appendix, p. 5-6).

40 Consistent with OCR's original position, the agreement with OCR imposed no restrictions on ability grouping of any kind that did not cause racially identifiable instructional settings. See supra n. 27.

41 At least some local advocacy representatives are skeptical of OCR's assessment. Susanna Doyle, from the Advocates for Children, said that the OCR negotiators were much too gullible about the Board's factual claims, including ones about the feasibility of implementation. The OCR negotiators, she said, "were like pillows, they could absorb anything."

42 "A Brief Analysis of the Civil Rights Compliance Agreement between the Board of Education and the U.S. Office for Civil Rights" (unattributed and undated but identified in cover letter to "Public Interest Lawyers," from Advocates for Children dated July 17, 1978 as a memo prepared by Martin Gerry.)

43 Gerry also urged that the new reporting procedures on student discipline were not a meaningful remedy. He noted, as well, that all of the charges

relating to sex discrimination under Title IX had been dropped from the revised student services letter "[a]fter nine months of closed discussions between the Board and OCR and other HEW officials."

44 Participants at the meeting had discussed possible strategies, including lobbying President Carter, urging the Attorney General's office to find the agreement in non-compliance with civil rights laws, and pursuing court action to set aside the Agreement. Alternatively, based on Gerry's statement that the agreement still left New York City drastically out of compliance with the ESAA requirements on racially isolated instructional settings, it was suggested that a suit be filed to cut off New York's ESAA funds. The question was also raised about the potential for challenging the agreement in the context of the Brown case. (The Brown court, however, had never previously inquired into the substance of any OCR compliance agreement.)

45 Apparently the impending deadline under the employment agreement for teacher integration in September 1980 stirred up activity on the student services area as well.

47 Delta Research Corporation reports NYC 42-15 and NYC 42-16. As mentioned above, no report was generated for 1980-1981.

48 There is obviously no organized constituency pressing for change in this area. In response to a questionnaire distributed in connection with this study, see infra, Chap. 8, n. 18 we found that only one of seven interest group respondents indicated an awareness that the number of racially identified classrooms had been reduced by OCR's intervention. By comparison, five of the eight OCR respondents said that OCR intervention had improved this area and only two of them considered it still to be a problem today.

49 In assessing the favorable statistics in the instructional grouping area, one must also keep in mind that these statistics assume that the Board of Education has assigned students to ability groups accurately and in good faith compliance with the complex requirements of the agreement. For example, although the 1979-80 Delta report indicated 143 identifiable classes, by controlling for

ability grouping, it also noted that if ability groupings are ignored, then there would be 687 racially identifiable classes. Thus, ability grouping is the automatic justification for 545 classes. Detailed analysis might, of course, raise questions about whether all of these classes belong in that category.

50 Board of Education, Addendum to Special Circular No. 103, 1969-1970, dated June 13, 1978. A copy of this Addendum is an appendix to the Letter of Agreement.

51 The addendum explained that a "disproportionate rate will be defined as being clearly beyond random chance". The technical specifications for this definition are set forth in Delta's Report to OCR dated July 31, 1979, as follows:

> (a) Junior and senior high schools having twenty or more suspensions during the time period are reported "if the proportion of Minority suspensions to Minority enrollment is greater than 1.25 times the proportion of Non-Minority suspensions to Non-Minority enrollment".
>
> (b) For all elementary schools and for other schools having fewer than 20 suspensions during the period analyzed, "the probability of arriving at the number of Minority suspensions is calculated based on the ethnic composition of the total school enrollment, using the Binomial probability formula". A school appears in the report "[i]f the probability of Minority suspensions is less than .2 given the Minority percentage in the school . . ."

52 Form letter from Chancellor Macchiarola dated September 24, 1979.

53 "Response to: HEW Office for Civil Rights Suspension Analysis Report, September 1978-January 1979," dated November 30, 1979. Examples of the categories of responses are: incorrect data; failure to differentiate special education pupils; adjustment problems; high mobility rate.

54 Some of his criticisms were set forth in his letter to the Chancellor dated December 12, 1979.

55 Doyle Interview and confidential AFC contemporaneous memorandum of the meeting. Tejada also noted that AFC's broader concerns about basic due process procedures for suspensions of handicapped children could not be addressed by OCR if they had no racial dimension.

56 A statistical disparity in suspensions does not, of course, necessarily indicate discrimination. The fundamental question is whether there are racial disparities in the numbers of students suspended who actually committed suspendable offenses (or who were suspended for no good cause). Thus, a disparity could be explained by showing that minority students committed more suspendable offenses, and punishments were meted out evenly among students of all races who committed such offenses.

57 In June 1980, OCR transmitted to the Board Delta's reports on staff integration and instructional groupings, but it is unclear whether the September 1979-January 1980 semi-annual discipline report was transmitted or discussed, or whether a Delta report was generated for the next semester, February 1980-June 1980. As noted at n. 47, supra, for the subsequent period, school year 1980-1981, there was no Delta contract.

58 "Record Keeping on Student - Discipline Procedures and Actions in School Districts", August 1975.

59 OCR has not seriously attempted to follow-up the unresolved handicapped education issues (shortened school day, improper identification and evaluation, lack of mainstreaming) or to monitor compliance with the Board's commitments in the agreement to eliminate waiting lists. Apparently, OCR is treating these issues about educational services for handicapped children as being pre-empted by federal court proceedings.

Jose P. v. Ambach, 3 E.H.L.R. 551:245 (E.D. N.Y. 1979), aff'd, 669 F.2 865 (2d Cir. 1982), a class action suit, was filed by South Brooklyn Legal Services in February 1979, on behalf of all handicapped children on the waiting lists, charging the Board of Education with violation of federal and state laws in regard to timely evaluation and placement. Soon afterwards, a parallel lawsuit, UCP v. Board of Education, 3 E.H.L.R. 551:251 (E.D. N.Y. 1979), was brought which repeated the claims about the waiting lists but, in addition, raised numerous other issues concerning program quality, architectural accessibility, lack of mainstreaming, etc. Yet a third related case was then brought based on the rights of language minority handicapped children (Dyrcia S. v. Board of Education). For a detailed discussion of the joint court decree entered in these cases and follow-up imple mentation problems and accomplishment, see Rebell, "Implementation of Court Mandates Concerning Special Education: The Problems and the Potential", 10 J. L. & Educ. 335 (1981).

CHAPTER EIGHT

EGALITARIAN IDEOLOGICAL PERSPECTIVE

Egalitarian ideology in America, as we noted in Chapters One and Two, reflects a dynamic, and sometimes difficult, tension between opposing ideological strands. The equality of opportunity pole is rooted in the basic American commitment to individual liberty. But, especially in the last quarter century, counter-pressures pushing for pragmatic remedies to overcome entrenched patterns of discrimination have bolstered the equality of result strand. Neither the Congress nor the courts reconciled these competing ideological strands and they provided no consistent egalitarian policies or principles to guide OCR's Title VI compliance review activities.

Thus, a key question this study has sought to answer is how may an administrative agency enforce civil rights laws when the egalitarian mandate, which is at the core of those laws, is undefined. Will the agency develop greater ideological consistency than Congress and the courts? If so, what may be the content--and implications--of that ideology? The detailed case study of the New York Review provides direct answers to these questions. The administrative implementation process in this instance did produce greater ideological consistency -- and this consistency was in a notably result-oriented direction.

This general conclusion should not be surprising. We noted in Chapters Two and Three that although the weight of the American liberal tradition presses strongly in an equality of opportunity direction, an equality of result counter-reaction has tended to occur when the practical problems which arise in guaranteeing the actual delivery of equal opportunities of those came to the fore. It is to be expected, then, that a "line" agency which deals on a daily basis with pragmatic mechanisms for remedying discrimination will naturally gravitate in a result-oriented direction.[1]

The persistance of this trend through various changes of personnel and political administrations indicates that there is an inherent institutional orientation in this direction. By the very nature of its mission, OCR, unlike Congress and the courts, could not deal in generalities, inconsistencies, or avoidance once it turned its attention to an issue.[2] In order to carry out its nationwide enforcement functions, it needed to articulate uniform, consistent ideological standards -- and standards that would prove effective in practice.

OCR's particular legal mandate strongly magnified these institutional tendencies. OCR was charged with enforcing civil rights laws -- the most ideologically charged regulatory responsibility imaginable. Unlike Congress and the courts, which were accountable to a melange of interests, OCR's constituency was essentially civil rights advocacy groups which tended "to invest every claim with the moral aura of a constitutional right";[3] operating in such a climate, OCR personnel could not help but be imbued with some moral intensity and ideological fervor.

Furthermore, this ideological momentum was not offset by an ongoing interrelationship with those being regulated, an important factor with many other regulatory agencies, that tempers regulatory zeal with a sensitivity for the regulatees' interests and problems. As a distinct civil rights enforcement agency separated from HEW's program divi-sions, OCR was strictly accountable for eliminating discrimination promptly and effectively. Consequential impacts on educational programming -- including services provided to minority and disadvantaged students -- was of concern, but fundamentally it was somebody else's responsibility.

However, it should also be noted that although OCR was more "ideological" than most state or federal regulatory agencies, at the same time, its involvement in day-to-day implementation problems at the grassroots level offset some of these abstract ideological tendencies, and gave its result-orientation a pragmatic grounding. In this sense, OCR's "moderate" result orientation might be said to represent a significant step toward reconciling the competing ideological stands of American egalitarian thought. Analysis of the issues and the substance of the compromise agreements on the two main issues involved in the New York Review, faculty assignment and student ability grouping, will show the extent to which such an ideological reconciliation was achieved.

I. Faculty Assignment Issues

It is ironic that racial balance of school faculties, one the few areas potentially subject to Title VI's jurisdiction upon which Congress explicitly sought to limit administrative oversight, became the major issue in the Big City Review implementation process. Section 604 of the Act precluded Title VI enforcement of employment practices, "except where a primary objective of the federal financial assistance is to provide employment." However, it was recognized, even in the Congressional floor debates, that this limitation would not apply where racial discrimination in the employment or assignments of teachers had a direct, detrimental impact on the educational opportunities of students.[4] In practice, this "exception" came to consume the whole rule.

In the deep South, where a failure to integrate school faculties would impede effectuation of any valid freedom of choice plans and would in itself constitute a flagrant perpetuation of a dual school system, faculty segregation practices clearly "infected" student opportunities in this manner. Maintenance of segregated faculties perpetuated the image (and the fact) of "black" and "white" schools and denied students of each race access to role models and individual talents of teachers of the other race.[5]

The legal significance of patterns of racial imbalance in faculty assignments in Northern school systems, which did not have a history of state-supported *de jure* segregation, however, was far from obvious. Nor were its educational policy implications obvious -- some minority advocates, after all, argued in favor of assigning black "role model" teachers to black schools.[6]

OCR's Big City Review did not distinguish for these purposes between patterns of *de facto* segregation in the North and the patterns of *de jure* segregation in the South. In 1972, when OCR commenced the initial stages of what was to become the Big City Reviews, its position was in keeping with decisions of a number of courts which had ruled that *de facto* segregation in the North was a constitutional violation, no different from *de jure* segregation in the South.[7] But by 1974, when the Reviews officially got under way, the Supreme Court had announced in *Keyes* v. *School District No. 1*[8] that some indicia of discriminatory intent would be necessary to find a constitutional violation in a Northern school district. And by 1976, when the first letter of findings was issued, the Court's decision in Washington v. Davis[9] had strongly emphasized the distinction between de jure (intentional) discrimination and de facto (disparate impact) discrimination.

Despite these important developments, Martin Gerry's 1976 letter of findings under Title VI focused almost exclusively on statistical patterns of racial imbalance and the need to remedy them. His sole citation of legal authority for the radical remedies he sought was the Supreme Court's earlier ruling in Swann, where faculty desegregation requirements evolved as part of the over-all remedies for eliminating classic Southern de jure segregation.[10]

If the statistics on faculty imbalance cited in the first letter (82% minority teachers assigned to schools having 84% or more minority enrollments; 15% assigned to schools where minority enrollment was under 35%) had been presented in the context of a classical student desegregation suit against a Northern city[11] they would have constituted important evidence of possible discriminatory intent and, if over-all a constitutional violation had been found, they certainly would have justified a faculty reassignment order.[12] But there had been no such case in New York. Neither OCR nor the Justice Department would initiate a student desegregation suit, of course, because any effective remedy in New York would have required busing, in violation of Nixon Administration policies.[13] Consequently, neither OCR nor the Board could confidentially predict whether these teacher assignment statistics, if examined as a separable issue, would be found by a court to establish a prima facie case of violation of Title VI or the Constitution.[14]

Under these circumstances, although OCR certainly had plausible grounds for alleging legal violations,[15] its neglect of the de jure/de facto and intent/impact distinctions was striking. A major explanation for this posture would be that OCR's fundamental result-oriented approach, growing out of its experiences in dismantling Southern school desegregation, became so firmly entrenched as a firm agency ideology that it was influenced little by major shifts in constitutional doctrine.

OCR's consistent result-oriented perspective was strongly evident in the remedies it insisted upon for rectifying the racial imbalances in faculty assignments. Both Gerry and Tatel[16] sought to apply the Singleton 5% standard on an immediate basis with mandatory transfers of however many teachers would be required to promptly meet that goal. It was not considered relevant that the Singleton remedies were devised by an Alabama court in response to a flagrant attempt to resist the Supreme Court's mandate to dismantle a dual school system, whereas in New York the faculty assignment patterns resulted, at least partially, from preferences of the minority communities and the workings of the alternative hiring system devised by community control advocates.[17]

OCR also passed over the subtleties of the *de jure*/*de facto* and intent/impact distinctions when it dealt with the testing issues. The *Griggs* impact standard for test validation under Title VII was read into Title VI without any supportive judicial precedents -- and at the very time that the validity of the same Board of Examiner's system was pending before the Federal District Court.

The fundamental equality of opportunity perspective of the New York City Board of Education[18] was in direct contrast to OCR's result-orientation. Chancellor Anker deeply believed that the differences between racial imbalance patterns in the South and in New York were fundamental and significant. He maintained that the New York City Board of Education had sought for years to promote, rather than impede, racial integration. Whatever inequities existed were caused by forces outside the Board's control.[19] Because Anker and the Board members thought they had no legal or moral responsibility for these patterns, they had difficulty understanding how OCR could seek to hold them accountable for assuring immediate statistical results, results which might have a detrimental impact on faculty morale and on the educational stability of the system.

The Board's formal response to the first letter of findings reflected a classical equality of opportunity perspective. It would not be pinned down to "specific guaranteed results." Nevertheless, it was willing voluntarily to take steps that might remove certain unintended barriers that were impeding minority employment or the transfer of minority teachers to predominantly white schools. Specifically, the Board was willing to implement a new voluntary transfer program, to increase the pool of available positions in predominantly white districts by speeding up retirements and leaves, and to eliminate use of subjective criteria, including "role model" concepts in the assignment of supervisory personnel. The Board also offered to explore possibilities for improving the validation of teacher examinations, and to seek legislation to eliminate rank ordering of eligible lists,[20] so long as no hiring quotas were involved.

The final agreement that emerged from the intensive negotiations on these issues compromised the disparate result/opportunity ideological perspectives of OCR and the Board into a package that might fairly be characterized as being moderately result-oriented. The lynchpin of the agreement was clearly based on results: the 5% Singleton standard was adopted and prompt (2 to 3 years) timelines were included. However, in deference to the Board's sensitivity to compulsory quotas and its expection that meaningful opportunities for integration could be achieved through various voluntary devices within the stated time periods, no provisions for mandatory teacher transfers were explicitly spelled out in the agreement.[21] On the testing issues, the Board's promises to validate the exams and seek legislation to eliminate rank order hirings were basically accepted, but these commitments were placed in a result-oriented framework by the agreement to undertake a labor pool study that would provide a quantative standard for assessing the effectiveness of the Board's promised reforms.

In essence, OCR largely prevailed in getting the New York City Board of Education to accept the result-oriented, quantitative performance goals that previously had been imposed only on school districts found guilty of de jure segregation after lengthy litigations. But, because this agreement emerged from a negotiating process, rather than as a judicial or legislative mandate, its result-oriented requirements were tempered by pragmatic concessions to the Board's major ideological and political needs. To the extent that the agreement allowed each party to believe its minimum goals were satisfied, without forcing it to yield critical principles,[22] the New York agreement may then be said to represent a significant reconciliation of the competing opportunity/result strands of American egalitarian ideology.[23]

II. Student Ability Grouping Issues

Classification practices which place children in separate tracks for instructional purposes, have been, and continue to be, wide-spread throughout the United States. Although such tracking usually is said to reflect student abilities, by and large, the practice has had segregatory effects, with minority children tending to cluster in the lower tracks and white children in the upper. Tracking, like busing, is potentially a sensitive political issue because it is perceived to threaten the access of white middle class students to "quality education."

The classic court decisions banning such tracking practices arose in the deep South at the height of judicial involvement in the dismantling of dual school systems. In this context, ability grouping practices were a transparent subterfuge to maintain racially-identifiable classrooms within a technically "desegregated" school.[24] Only in one reported case have the more complex student tracking practices prevalent in Northern and Western cities been scrutinized.[25] This was the 1967 decision in *Hobson* v. *Hansen*,[26] where Judge Skelly Wright banned the ability grouping practices in Washington D.C. on the grounds that the tests used to classify the children had not been validated and that the purported remedial aspects of the tracking program were not working. No court has, however, applied the *Hobson* precedent to invalidate any other major school tracking system, although (as the New York Review case study has shown) similar patterns of unvalidated student classification practices which detrimentally impact on minority children undoubtedly exist in many other urban school systems.[27]

OCR, however, did pursue these issues in its New York City student services review.[28] The statistics which had emerged from Gerry's extensive investigations, and were re-affirmed in the new Administration's revised letter of findings, were disturbing: thousands of minority children were being relegated to lower tracks on the basis of vague or subjective criteria, and without any apparent educational justification. Although there were no direct legal precedents under Title VI to assess these practices, OCR referred to the standards set forth in its ESAA regulations,[29] and insisted that any student ability grouping be justified by "clear and convincing evidence" of educational necessity, the results of which could be "validated by test scores or other reliable objective evidence."

OCR's result-oriented emphasis on compelling educational justifications (which would eliminate most tracking) was countered by the Board of Education's insistence that its ability grouping practices were based on "merit" considerations geared to maximizing opportunity for students at all ability levels. Having conducted a detailed survey of all the classrooms whose groupings were questioned by OCR, the Board claimed that 96% of the classroom assignments were educationally justifiable, and the 4% questionable cases, which would be promptly eliminated, hardly provided a basis for a finding of intentional segregation.

These student ability grouping issues were resolved less confrontationally than the faculty assignment issues. This was undoubtedly because investigations undertaken during the course of the negotiating process led the Board to admit that a much more pervasive pattern of invalid practices was taking place than it had recognized: Children were being assigned to separate tracks based on bus routes, their ability to tell time, or other extraneous factors. Furthermore, the Board's own negotiators tended to admit the validity of research findings indicating that at least in the elementary grades, homogeneous grouping patterns had little apparent connection with enhanced student achievement. In short, the equality of opportunity perspective was difficult to defend after it had been demonstrated that traditionally defined "opportunities" were not really being made available.

The final agreement reached by the parties largely incorporated the burden-shifting, result-oriented approach of the ESAA regulations. Tracking was totally eliminated at the kindergarten and first grade levels and minimized for the higher grades. Assignments would be made on the basis of objective tests, and special, documented efforts aimed at raising the achievement level of students in the lower tracks would be required. A potentially important innovation was the provision on "teacher judgment", which permitted exceptions to classifications based on "objective" testing -- when such exceptions were in the direction of increasing minority representation in the higher tracks.[30]

The ability grouping agreement, then, like the faculty assignment agreement, represented a significant reconciliation of opportunity/result egalitarian concepts. In this case, the result proponents (OCR) were actually able to convince the opportunity proponents (the Board) that their abstract commitment to individual opportunity was belied by the facts. The Board, therefore, agreed to tighten its standards in a way that would both promote greater minority representation in the higher tracks and would allow for statistical monitoring; OCR for its part accepted a pragmatic approach and did not press for the radical "result" of totally eliminating the tracking system, which had been the upshot of the Hobson case.

In sum, then, theideological inconsistencies in anti-discrimination law left open by Congress and the courts were, to a significant extent, reconciled through the administrative enforcement process. Thus, "equality", could be said to have been "defined" in the New York educational context to mean assuring opportunities to minority faculty and students by committing the system to achieve statististically-defined levels of access within explicit time frames --- while, at the same time, permitting the system broad discretion on the means for doing so.

The moderate result-oriented ideological synthesis resulting from the OCR/NYC experience, of course, was directly related to the implementation process through which it emerged. Ideological approaches formulated in the course of enforcement proceedings could be expected to be both more oriented to achieving definable results and more sensitive to pragmatic realities than principles hammered out in more abstract legislative or judicial settings.

Thus, a tentative conclusion that emerges from the egalitarian ideological analysis of the OCR/NYC case study is that egalitarian ideological issues left unresolved by the legislative or judicial processes will tend to be resolved in a pragmatic result-oriented direction through the administrative enforcement process. By itself, however, this finding is incomplete. Although ideological strands may have been reconciled, it is also important to know whether the compromise agreement was practical and effective. Did the agreements reached on paper led to meaningful reforms in practice? Answers to these questions cannot be provided by the egalitarian ideology perspective. To consider them, we must apply a different analytic perspective -- namely the implementation perspective, which is the subject of the next chapter.

1 "Similar conclusions have been reached by studies of the implementation of other equality statutes:

> "The language of Title VII of the Civil Rights Act of 1964 is stated in functional terms that deal with a variety of personnel actions, e.g., hires, discharges, compensation, deprivation of opportunities. Its thrust is to eliminate discrimination by assuring equal treatment in job mobility -- that is, equal opportunity...The enforcement agencies, on the other hand, interpret Congressional policy as requiring more than mobility, that what should be done is to eliminate the effects of past discrimination immediately. In other words, job parity or a numercial equivalency in the number of jobs held and the levels of compensation received must be achieved at once rather than awaiting the effects of equal opportunity." K. McGuiness, "Foreward" in E. Livernash, ed.; Comparable Worth: Issues and Alternatives vi (1980).

2 Of course, as illustrated by the Adams v. Richardson case, discussed in Ch. 5, OCR also engages in avoidance techniques when it decides to drop or ignore enforcement on certain issues or in certain geographical areas. The point here is that when OCR does act, it tends to act in a consistently result-oriented direction.

3 Rabkin, "The Office For Civil Rights" in The Politics of Regulation 331 (J. Wilson, ed. 1980).

4 See discussion in Ch. 4, p. , concerning the legislative history of §604, 42 U.S.C. Section 2000d-3.

5 See United States v. Jefferson County Board of Education, 372 F.2d 836, 883 (5th Cir. 1966); 45 C.F.R. §80.3(c)(3). See also Rogers v. Paul, 382 U.S. 198, 200 (1965); Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 18 (1971).

6 In the context of the "voluntary" agreements negotiated by OCR in New York, the federal courts have since held that §604 is not a bar to enforcement of Title VI faculty segregation issues in the North.

See *Caulfield* v. *Board of Education*, 486 F. Supp. 862, 876 (E.D.N.Y. 1979); *see also* *Zaslawsky* v. *Board of Education*, 610 F.2d 661 (9th Cir. 1979); *North Haven Board of Education* v. *Bell*, ___ U.S. ___, 102 S. Ct. 1912 (1982) (Infection theory upheld in enforcement of Title IX sex discrimination standards).

7 *See*, *e.g.*, *Oliver* v. *Kalamazoo Board of Education*, 346 F. Supp. 766 (W.D. Mich. 1972), *aff'd*, 448 F.2d 635 (6th Cir. 1971); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970), *aff'd*, 427 F.2d 1352 (9th Cir. 1970); *Johnson* v. *San Francisco Unified School District*, 339 F. Supp. 1315 (N.D. Cal. 1971). Note, however that even at this time a majority of the federal courts indicated that discriminatory intent was necessary to establish a constitutional violation. *See*, *e.g.*, *U.S.* v. *School District 151 of Cook County Illinois*, 286 F. Supp. 786 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968), *cert. denied*, 402 U.S. 943 (1971).

8 413 U.S. 189 (1973). After *Keyes*, most of the prior federal court decisions which had found constitutional violations in situations of *de facto* segregation were reversed or reconsidered. *See*, *e.g.*, *Johnson* v. *San Francisco Unified School District*, 339 F. Supp. 1315 (N.D. Cal. 1971), *rev'd*, 500 F. 2d 349 (9th Cir. 1974) *United States* v. *Texas Education Agency*, 467 F.2d 848 (5th Cir. 1972), *aff'd in part, rev'd in part en banc*, 532 F.2d 380 (1976) (intent approach adopted and satisfied); *Oliver* v. *Kalamazoo Board of Education*, 368 F. Supp. 143 (W.D. Mich. 1973).

9 426 U.S. 229 (1976).

10 The Supreme Court held in *Swann* that:

> "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown."

402 U.S. 1, 18 (1971). Even before *Swann*, the Supreme Court's strong emphasis on elimination of

faculty desegregation was indicated by its holding in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969), where it reversed the Court of Appeals for the Fifth Circuit and reinstated a district court's desegregation order on faculty assignments which contained numerical ratio requirements.

11 In Northern cities, the courts looked to a variety of factors as indicia of discriminatory intent such as dual attendance zones (*Bradley* v. *Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974); *United States* v. *Board of School Commissioners*, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973)), transfer policies that accentuated white flight and deterred blacks from attending white schools (*Booker* v. *Special School District No. 1*, 351 F. Supp. 799 (D. Minn. 1972) (busing past the nearest school), *United States* v. *School District 151 of Cook County Illinois*, 286 F. Supp. 786 (N.D. Ill. 1968), *aff'd* 404 F.2d 1125 (7th Cir. 1968)), use of school construction policies that fostered racial imbalance (*Milliken supra*, *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd sub. nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974)). In addition, patterns of faculty segregation themselves constituted an important factor in determining discriminatory intent. *See, e.g.*, *Kelly* v. *Guinn*, 456 F.2d 100, 107 (9th Cir. 1972). Gary Orfield has indicated that under these standards most large Northern and Western cities tended to be found guilty of intentional discrimination "when integration was seriously pursued." G. Orfield, *Must We Bus*? 24 (1978). However, in one of the two major desegregation cases that have been brought in regard to segregation at particular New York City schools, the Board of Education prevailed. *Parents Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705 (2d Cir. 1979). *But cf. Hart* v. *Community School Board*, 383 F. Supp. 699 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

12 *See, e.g.*, *Kelly* v. *Guinn*, *supra* n. 12 (faculty reassignment order issued where 80% black teachers were in majority black schools); *Booker* v. *Special School District No. 1*, *supra* n. 12 (61% of black elementary school teachers were in 14 elementary schools, each of which had over 15% black

students); *Morgan* v. *Hennigan*, *supra* n. 12 (75% of black teachers in schools 50% or more black).

13 *See* pp. 113, 148, *supra*.

14 Judge Weinstein later indicated that with the statistics on faculty assignment patterns presented by OCR, "a strong case could be made for intentional discrimination." *Caulfield* v. *Board of Education*, 486 F. Supp. 862, 920 (E.D.N.Y. 1979).

15 There was precedent at the time for believing that despite the Supreme Court's clear distinction in *Washington* v. *Davis*, *supra* n. 9, between discriminatory intent and discriminatory impact for constitutional purposes, Title VI might be read to establish an independent statutory "impact" standard. (*See*, *e.g.*, *Lau* v. *Nichols*, 414 U.S. 563, 568 (1974). Current case law, however, is tending strongly in the other direction, indicating that Title VI requires a showing of intent (see, e.g., *Regents of the University of California* v. *Bakke*, 438 U.S. 265, (1978); *Parents Association of Andrew Jackson High School*, *supra* n. 12; *Lora* v. *Board of Education*, 623 F.2d 248 (2d Cir. 1980); *Harris* v. *White*, 479 F. Supp 996 (D. Mass. 1979). *But cf*. *Board of Education* v. *Harris*, 444 U.S. 130 (1979).

16 Although Tatel, when interviewed after the fact, did make references to the need to marshall sufficient evidence to establish discrimination intent in the event that the issues had to be brought to court, it is significant that he rejected the Board's Equal Opportunity plan precisely because it did not contain commitments to achieve specific results. *See* discussion in Chap. 6, p. 37, *supra*.

17 In Los Angeles, the School District's defense to the original letter of findings had emphasized that faculty imbalance patterns resulted largely from the District's attempts "to be responsive to community demands for greater minority representation" ("Position of the District" submitted to OCR on May 9, 1975, cited in letter from Floyd L. Pierce to William J. Jonston, dated March 5, 1976). OCR's Regional Director took this as a blatant admission of discriminatory intent, writing that whether motivated by community pressures or not, such a policy:

> "...reinforces, rather than undercuts the presumption of segregative intent with respect to students, since it would logically suggest herding black students into their own schools where they can be taught by their proper black role models...The defendant are thus hoist by their own petard." (Id. at 3)

Note that in Northern school desegregation cases, after intentional discrimination had been found, the courts have rejected the "role model argument" on both policy and legal grounds. See, e.g., Morgan v. Hennigan, supra n. 12; Arthur v. Nyquist, 429 F. Supp. 206 (W.D. N.Y. 1977), aff'd 573 F.2d 134 (2d Cir. 1978).

18 As a quantative supplement to our in-depth interviews, we sent follow-up questionnaires to all our interviewees and to a number of additional persons who had some connection to the process. (See the Appendix for a discussion of methodology.) When asked to categorize OCR's position in terms of the opportunity/result dichotomy, as defined in Ch. 3, 6 of the 7 Board of Education respondents replied that OCR's position reflected a result-orientation (two of these said it also reflected an opportunity perspective). Five of these respondents labelled the Board of Education's position as fully or partially "opportunityoriented" and one called the Board's position "result-oriented."

Of 8 OCR/Justice Department respondents, seven said the Board's position reflected no consistent philosophical position (one had no opinion). Four of the government respondents thought OCR's position fully or partially represented a result perspective, while seven said it fully or partially represented an opportunity perspective.

Over-all, considering the complexity of the opportunity/result definitions, and the politically sensitive connotations for a government official to admit to an equality of result philosophy, we believe that these reponses tend to support our view that the OCR/Board positions largely reflected a classic result/opportunity contrast.

19 Chancellor Anker felt so strongly about these issues that he attached to the questionnaire form he returned to us, a letter with the following comments:

> "You will notice that I found it difficult to respond to many of the choices. There is, to my mind, great danger that any report will assume that disparate effects of policies will be taken to be evidence of discrimination. The result could set back the cause of civil rights and of equal opportunity for all groups.
>
> For example...Certainly there were more minority teachers in schools in so-called minority pupil areas (as principal of Franklin HS, I employed more minority teachers than did principals in middle class areas. This did not necessarily imply discrimination by others. (Of course, I do not declare *all* innocent of discrimination.) But minority teachers did tend to drift, of their own volition at times, to such schools. School boards in such districts actively recruited teachers of their ethnic background at times. A second examination track (and an easier one) was created by the Decentralization Law to open the way to more easily obtain minority staff, etc..."

20 Title VII, and especially the NTE cases, had consistently shown that slight numerical differences in test scores could not be psycho-metrically defended as valid indicators of differences in actual ability or confidence. *See*, *e.g.*, *Bridgeport Guardians* v. *Members of Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Baker* v. *Columbus Municipal Separate School District*, 329 F. Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972); *Walston* v. *County School Board*, 492 F.2d 919 (4th Cir. 1974); *U.S.* v. *North Carolina*, 400 F. Supp. 343 (E.D. N.C. 1975), *vacated*, 425 F. Supp. 789 (E.D.N.C. 1977); *Georgia Association of Educators* v. *Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976).

21 The lack of clarity on this issue of course, became an important problem in the implementation process, which will be analyzed in the next chapter.

22 Note in this regard, the Board's defense of the agreement in the *Caulfield* litigation. The fact that later difficulties experienced in the implementation stage and a major change in the political climate in Washington allowed the Board to obtain

substantial modifications of the agreement in 1982 does not, of course, detract from the historical significance of the 1977 Agreement which still exemplifies how equality of result and equality of opportunity perspectives can be reconciled in a situation where both are being strongly pressed.

23 The New York agreement clearly was more "moderate" than the agreements obtained by OCR on similar issues from the boards of education in Chicago, Los Angeles, and Philadelphia, where immediate mandatory teacher transfers were required.

24 *See*, *e.g.*, *Singleton* v. *Jackson Municipal Separate School System*, 419 F.2d 1211, 1219 (5th Cir. 1969), *rev'd in part on other grounds*, 396 U.S. 290 (1970); *Lemon* v. *Bossia Parish School Board*, 444 F.2d 1400, 1401 (5th Cir. 1971); *see also Moses* v. *Washington Parish School Board*, 330 F. Supp. 1240 (E.D. La. 1971), *aff'd* 456 F.2d 1285 (5th Cir. 1972).

25 Passing reference to these issues has, however, been noted by other courts. *See Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501, 519 (C.D. Cal. 1970), *aff'd*, 427 F.2d 1352 (9th Cir. 1970), *Hart* v *Community School Board*, *supra*, n. 12. In *Larry P*. v. *Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974), 495 F. Supp. 926 (N.D. Cal. 1979), methods for classifying and tracking mentally retarded students, which had racially discriminatory effects, were invalidated. In *Berkelman* v. *San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974) however, the Ninth Circuit refused to invalidate admissions practices to an elite high school [add Chicago I.Q. test case] For a more detailed analysis of the student tracking cases, see Rebell & Block, "Competence Assessment and the Courts: An Overiew of the State of the Law" ERIC Document No. ED. 192-169 (1980); Kirp, "Schools As Sorters: The Constitutional and Policy Implications of Student Classification", 121 U. Pa. L. Rev. 705 (1973), Sorgen, "Testing and Tracking in Public Schools", 24 Has. L. J. 1129 (1973); and Bersoff, "Regarding Psychologists Testily: Legal Regulation of Psychological Assessment in the Public Schools", 39 Md. L. Rev. 27 (1979).

26 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom*. *Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

Although the Washington, D.C. school system had been operated on a *de jure* segregated basis prior to the Supreme Court's decision in *Brown* v. *Board of Education* (and its Fifth Amendment analogue, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), the *Hobson* decision was not based on findings of intentional discrimination, and in fact, the Court emphasized that the superintendent in Washington was apparently motivated by valid educational considerations. *See*, *Hobson* at 443.

27 The reasons why other courts did not follow the *Hobson* precedent, at least in the early years before firm requirements for discriminatory intent had been established, is not immediately clear. Apparently, civil rights activists in the North considered classic student desegregation suits a higher priority. Martin Gerry turned his attention to ability grouping and the other student services issues largely because Nixon administration policies precluded active pursuit of traditional student segregation cases that might require busing.

Tracking practices were, of course, considered by Congress in the ESAA legislation. Thus, 20 U.S.C. §3196(c)(1)(C), repealed, Pub. L. No. 97-35, Title V §587(a)(1), 95 Stat. 480 (1981), denied eligibility to school systems which have in effect a procedure that "results in the separation of minority group from non-minority group children for a substantial portion of the school day." Note that an exception is provided for any "bona fide ability grouping", but what "bona fide" means in this context is not specified.

28 OCR did not, however, pursue student ability grouping issues in the Los Angeles and Philadelphia reviews.

29 45 C.F.R. §§185.43(c), 185.44(e)(1973). The regulations contain more result-oriented requirements than the ESAA statutory standards. For example, they define "bona fide" in terms of objective selection tests, limitations on assignment to a relevant portion of the school day and actual academic improvement, especially for those in the lower tracks. For a discussion of the background and application of these regulations, see *Board of Education, Cincinnati* v. *H.E.W.*, 396 F. Supp. 203 (S.D. Ohio 1975), *rev'd and remanded on other grounds*, 532 F.2d 1070 (6th Cir. 1976).

30 This innovation reflected a recognition that the state of the art in test measurement really could not provide the type of "objective" tests contemplated by the regulations.

CHAPTER NINE

THE IMPLEMENTATION PERSPECTIVE

Implementation analysis is premised on an assumption that the precise policy goals set forth in a statute will not necessarily -- or even probably -- be fully realized in practice. Implementation is largely an evolutionary process whose final outcome cannot be predicted in advance. Thus, for the implementation analyst, careful case studies of what happens after a law goes into effect are as important as understanding the stated purposes of a statute and the decision making process that led to its passage.

As noted in Chapter One, unraveling the interrelated web of developments in the "implementation game"[1] can be problematic because of the wealth of variables that may affect the process. In the context of the New York Review, however, there are three major variables that clearly had overriding significance, and can, therefore, serve as a framework for analyzing the investigative and negotiating processes. These variables -- "goal ambiguity"; "organizational process" and "politics" -- are discussed in the following section. The chapter will then conclude with some reflections on additional implementation issues that arose in attempting to achieve compliance with their terms.

I. The Investigative and Negotiating Stage

A. Goal Ambiguity

Pressman and Wildavsky summarized the implementation process in their classic study of implementation as follows:

> "...A new agency called the Economic Development Administration (EDA) is established by Congress. The EDA decides to go into cities for the purpose of providing permanent new jobs to minorities through economic development...Congress appropriates the necessary funds, the approval of city officials and employers is obtained, and the program is announced to the public amidst the usual fanfare. Years later, construction has only been partially completed, business loans have died entirely, and the results in terms of minority employment are meager and disappointing. Why?"[2]

Thus, the focus of their study was on understanding why EDA's specific statutory goal (to develop new jobs for minorities) had not been accomplished. Although numerous intervening factors and their interrelationships had to be considered, the EDA study, like most other implementation analyses, at least began with a clearly defined, fundamental policy goal against which later developments could be measured. Such a base line policy goal was lacking, however, in the case of OCR civil rights enforcement in Northern cities.

OCR's Title VI enforcement responsibility was to ensure that all beneficiaries of federal funding programs were receiving "equal" educational opportunities. The Congressional debates had reflected clear policy standards for Southern school desegregation; "equality" in that context meant the dismantling of dual school systems and the prompt integration of white and black students. Operating under this clear standard, OCR formulated explicit desegregation guidelines, which, used in conjunction with the strong stance of the courts in Swann, Singleton and other cases, achieved impressive results: in the years between 1964 and 1972, the proportion of black students attending all black schools declined from almost 100% to less than 10% in the states of the "old confederacy."[3]

In regard to the more conceptually problematic segregatory patterns in Northern urban areas, however, Congress articulated no clear policy goals either on the face of the statute or in the legislative history.[4] Such "second stage" concerns were simply too speculative at the time of the passage of Title VI. Given this leeway, the initial model for the Big City Reviews, was eclectic. Compliance standards were derived from OCR's desegregation guidelines and judicial mandates in the Southern cases; Congressionally created eligibility criteria under the ESAA funding statute; guidelines and court decisions in bilingual and employment testing areas; and innovative new concepts that took into account the politics of busing and the administration's "Southern Strategy". To apply these standards OCR committed itself to the extensive use of statistical methods and automated data processing techniques to assess civil rights compliance.

Although Gerry's initial delineation of issues for the Big City Reviews appeared to have created an entirely new policy initiative that would fill the "void" created by the lack of clear policy standards in the statute, the eclectic package of standards and methods did not, in fact, prove viable. By the time serious negotiations got underway in New York (and the other big cities) most of the issues identified in the original investigative model had been sharply modified or eliminated altogether, and others dropped by the wayside en route to the agreements.

The disintegration of the Big City Reviews issue agenda in New York is charted in Figure 1, which juxtaposes the main investigative categories in which allegations of discrimination were made, with the areas actually covered in the two agreements.

FIGURE 1
Issue Changes in the New York Review

Original Issues*	Issues Covered By First Agreement	Issues Covered By Second Agreement
A. Comparability		
1. Instructional expenditures		
2. Nature and extent of instructional services and programs		
3. Allocation of state and local funds		
4. Allocation of human resources		
B. Student Assignment		
1. Racially identifiability of instructional groupings		Elimination of clearly inappropriate criteria for classroom organization and limitations on use of "ability grouping" criteria
2. Racial impact of special education classification practices		
C. Access to Educational Opportunities		
1. Criteria and practices re: availability of and admission		
Original Issues*	Issues Covered By First Agreement	Issues Covered By Second Agreement

to specialized classes and high schools		
2. Appropriateness of instructional approaches and curricular materials for language minority children		[Remedies parallel to Aspira Consent Decree set forth in separate agreement** with OCR]
3. Sex-stereotyping in vocational programs		
D. Non-Instructional Activities		
1. Disciplinary practices		New record keeping and monitoring procedures concerning racial impact of suspension
2 Guidance services (channeling by race, national origin, sex)		
3. Psychological services		
4. Access to extra curricular activities		

Original Issues*	Issues Covered By First Agreement	Issues Covered By Second Agreement
		Handicapped students on waiting lists to be offered placements promptly.
	1. Faculty integration (5% range) 2. Validation of teacher licensing exams in accordance with "accepted professional standards" 3. Commitment to seek changes in state law on merger of eligibility lists, and abolition of rank order appointments. 4. Commitment to achieve minority representation consistent with minority proportion of qualified labor pool. 5. Affirmative action program to increase number of women in supervisory service.	

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* The "original issues" as defined in Figure 1 are a synthesis of the main issues raised in the original Issues Outline and of the statement of findings in the EES letter of January 18, 1977.

** "Plan to Comply with Title VI CRA also Submitted as Part of Application for Waiver of Ineligibility," (Board of Education of the City of New York, September 15, 1977).

Figure 1 shows that of 13 original major issue areas (which included about 50 subareas), the major New York agreements[5] provided remedies only for racially identifiable settings (ability grouping) and for discipline problems.[6] Also striking is that the bulk of the time, effort and controversy in New York revolved around employment issues -- teacher hiring and assignment -- which had not even been part of the original model. This pattern was repeated in Chicago, Philadelphia and Los Angeles.[7]

Why did Gerry's attempt to fill the statutory policy void with an innovative policy agenda fall so short of the stated goals? It is tempting to explain this occurrence by the change of presidential administrations and the fact that Gerry was forced to depart before his project could be completed.[8] But even during Gerry's tenure, the original issue agenda had begun to disintegrate as attention shifted from student services to employment issues. (In Los Angeles, serious investigation of the original issues was never even commenced.) Thus, a fuller explanation is needed for this striking and consistent pattern of extensive concentration on faculty assignment issues which had not been part of the initial Big City Reviews model.

Some explanatory factors were particular to New York. Gerry originally had consciously rejected inclusion of the sensitive employment issues in order to avoid a head-on confrontation with the teachers' union. These issues were later added to the New York investigation after the NAACP and the Civil Liberties Union had lodged formal complaints about the impact on minority teachers of lay-offs resulting from New York City's fiscal crisis. These complaints were filed at a point in the Adams and Brown cases when OCR needed to show sensitivity to its complaint processing responsibilities; consideration of these claims was further dictated by Gerry's implementation strategy of enlisting the support of local civil rights groups. (Personality factors may also have been relevant -- Gerry apparently was outraged when he learned the details of the New York hiring system).

But the dominance of the employment issues in all four cities still needs a more fundamental explanation. We believe the critical factor was Title VI's basic goal ambiguity. Although one might expect that this ambiguity had left an open field for ambitious policy innovation, in fact, the void could not be filled by new initiatives which lacked strong precedent or political support. Instead, the implementation process gravitated to more familiar, well-entrenched policy grounds. In contrast to the novelty of many of the issues on Gerry's initial agenda, there was a long history of successful integration of teaching staffs pursuant to policy standards delineated in Southern desegregation guidelines, ESAA regulations and court decisions.[9]

The availability of clear policy standards in the

Southern desegregation guidelines and ESAA regulations provided a center of gravity for OCR's operations, despite changes in political administrations. This dynamic explains Tatel's follow-up on the employment issues as well as his emphasis on classroom segregation problems from among the numerous student service issues. (Classroom segregation was an area concerning which there was substantial judicial experience in the South and detailed administrative criteria in the ESAA regulations.[10])

In short then, the Big City Review experience indicates that if a deliberate policy perspective is not engrafted into the statute by the Legislature, the administrative agency charged with its implementation tends in practice to emphasize the issues, priorities and compliance approaches with which it is most familiar. In other words, the legislative decision to leave basic policy making to the enforcement agency had, at least in this circumstance, the rather surprising effect of promoting a conservative ordering of issue priorities, rather than creating a viable open field for new policy concepts and initiatives.

B. Organizational Process

The organizational structure of OCR in the early 1970's was not designed for comprehensive, agency-initiated investigations of major cities. Consequently, Martin Gerry decided to create a new organizational structure for this project. Basically, the Big City Reviews team was an executive level operation reporting directly to Gerry in the Washington headquarters and circumventing the regular regional OCR structure. Additional independence from existing organizational routines was effectuated by obtaining extensive services from outside data processing and consulting firms. Gerry also sought to build direct contacts with local constituency organizations (which he hoped to merge into a permanent network) that might fight at the grassroots levels for OCR-initiated reforms.

Gerry's organizational structure also incorporated a heavy "systems management" approach to implementation. The Issues Outlines and the exacting protocols drawn up in conjunction with data processing experts established a hierarchical information structure which would channel investigative activities, perceptions, and the accumulated data into pre-determined analytic models established by the central plan.

This heavily-structured systems management approach may, to some extent, have fallen of its own weight. It is questionable whether an enforcement agency like OCR could sustain a capability to simultaneously pursue 13 major substantive issue areas, and 50 subareas, even if other factors had not modified or deflected the initial goals. (Goal ambiguity, of course, exacerbated this problem; if the review had been based on strong, consistent policy standards, a higher level of commitment by the staff to the new approach may have been sustainable.)

Multiplicity of issues diffuses attention and makes it difficult to communicate a plausible set of findings and remedial proposals, both to school boards and the general public. And, since effective implementation requires long-term involvement and sustained commitment both by OCR and local advocacy groups, it may well have been self-defeating to adopt an agenda that would exceed the probable long-range resources and attention span of OCR and these groups.

Therefore, it probably was inevitable that after Gerry departed (and perhaps even if he hadn't) more normal organizational routines would begin to reassert themselves. Indeed, prior to the appointment of a new director in 1977, and a clarification of political direction from the new administration, Acting Director Albert Hamlin, a career professional in the office, initiated a reconsideration of both letters of findings and called upon outside experts to provide an objective overview of the state of the review.

When Tatel took office as Director, he intensified these efforts toward organizational normalcy. His orientation was nearly the opposite of Gerry's. Whereas Gerry had tried to carve out a special Title VI enforcement project in an agency that was otherwise operating under political pressures to slow down its enforcement efforts, Tatel began with the assumption that he was part of a pro-civil rights administration and that all enforcement activities should therefore be integrated into the regular channels of a revitalized agency.

The expenditure of resources by OCR on the Big City Reviews had to be brought into line with other priorities. A decision was made to limit the number of issues to be pursued and to press those which remained as expeditiously as possible. It may well be that some of the issues which were dropped from the second letter or which were deemphasized in the negotiations could have been reworked into convincing, substantial allegations. But Tatel would not allocate OCR's resources and its political capital in pursuit of the myriad EES issues.

The extended time frame of the monumental Big City Reviews project created additional problems. The longer it takes an implementation process to unfold, the greater the number of "decision points" that will have to be crossed, and the more opportunity there will be for variables to deflect the process from original goals and expectations.[11] Here, after the initiation of the Big City Review, four years passed before the promulgation of the first New York letter of findings, and six years before the completion of the New York negotiations. During these time intervals, new factors (including the political developments discussed in the next section) interfered with a straight pursuit of Gerry's original issues agenda.[12]

The legal orientation of a civil rights enforcement process further exacerbates the problems caused by delay in implementation because the compliance concepts with which the agency is dealing are highly susceptible to shifts in doctrine or in emphasis in newly decided court decisions. Martin Gerry's letters of findings, and his testimony in the *Caulfield* case, indicate that he was heavily influenced in the initial stages of the Big City Review by the Supreme Court's decisions in *Lau* v. *Nichols*[13] and *Griggs* v. *Duke Power Co*.[14] In both of these cases, the Court held defendants liable for discriminatory impact regardless of their intent. At that time, the Court seemed to be moving in a result-oriented direction. As indicated in Chapter Three, however, a counter-trend began to emerge shortly thereafter. In *Keyes*,[15] *Milliken*[16] and *Davis*,[17] the Court increasingly emphasized a need to establish proof of discriminatory intent. Gerry tried to resist the implications of these cases, and his continuing insistence on a statistical/impact approach, despite a changed legal atmosphere, created additional tensions with the board and the union.[18]

The changed legal climate did, however, strongly influence David Tatel. Sensitive to the implications of *Davis* and the recent school desegregation cases, he became skeptical about Gerry's emphasis upon statistical proofs of disparate impact for establishing legal liability on the broad variety of Big Cities Review issues. He insisted that the proof accumulated on all these issues be re-considered from the perspective of whether sufficient evidence existed to establish discriminatory intent in a court case. Apparently, despite the enormous amount of evidence accumulated during the four-year investigatory process, OCR's data on many of the initial issues failed to meet the more demanding standard, and OCR thereafter did not pursue them vigorously.[19]

In addition to providing insights on why the Big City Review methodology and agenda could not be sustained throughout the enforcement process, organizational process factors help to explain OCR's result-oriented ideological stance as discussed in Chapter Eight. The predominant thrust of Title VI's legislative history, as discussed in Chapter Four, reflected equality of opportunity perspectives. The ESAA, by way of constrast, was largely result-oriented, since it provided monetary rewards to school districts which would commit themselves to achieving specified integrative results. Because the same agency was vested with enforcement responsibilities for both statutes, the standards of the two Acts virtually became merged in the field. Neither OCR investigators nor school district respondents focused on the differences between the two statutes during the day-to-day enforcement activities. Practically, if not legally, compliance with Title VI often came to mean compliance with the detailed ESAA standards.[20]

Thus, ESAA's specific, result-oriented standards tended to compensate for Title VI's policy ambiguity, pulling OCR's priorities in their direction.

C. Politics

Political factors heavily influenced the origins and the substance of the Big City Review approach. Not surprisingly, as the political environment changed, the direction and the content of OCR's position was modified. The Big City Reviews were, in large measure, a response to administration and Congressional pressures during the early Nixon years for "even-handed" civil rights enforcement in the North. The seemingly incongruous posture of the Nixon Administration pushing for strong result-oriented remedies becomes readily understandable when one considers that the targets of this affirmative action thrust were New York, Philadelphia, Chicago, and Los Angeles, the Democratic-controlled, major urban centers whose "hypocrisy" on civil rights issues might thereby be exposed.

The Ford Administration's de-emphasis of Nixon's "Southern strategy" and the Carter Administration's reversion to more classical civil rights concerns necessarily caused major shifts both in the manner and the substance of the issues being pursued in the big cities. Tatel surely had no interest in "embarrassing" the Democratically-controlled urban centers. On the contrary, he knew that because of their political ties (including those of the teacher unions), any positions OCR would stake out must have strong legal, evidentiary and political justification.

Consistent with the new administration's commitment to pursuing classical student integration issues on a nationwide basis (and despite continuing Congressional anti-busing strictures), Tatel decided to re-orient the compliance thrust in Chicago and Philadelphia, where no letters of findings had yet been issued, toward preparing for possible student integration suits. Accordingly, regional OCR officials were advised that the remaining student services issues were now low priority. In New York, where the second letter of findings had already been issued, OCR continued, after reconsideration and review, to pursue those items on which there appeared to be substantial evidence which could hold up in court. Those issues with less compelling evidentiary (or political) substance, however, were quickly dropped during the negotiation.

The change in political administrations also influenced the manner in which the negotiations were conducted. In both New York and Chicago, the cities where the issues were most complex and the boards offered the most resistence, the new Democratic regime hired experienced private civil rights attorneys as special consultants to represent OCR in the negotiations. These decisions were apparently informed both by a desire to quickly resolve these long festering matters with an infusion of high-level talent, and by lingering suspicions about the loyalty and/or competence of the local OCR staff people inherited from the Republicans. The consultants' position outside the normal agency lines of command and their professional reputations gave them a semi-independent status that insulated the negotiating process from day-to-day political pressures. This insulation appeared to have a salutory effect (at least from OCR's perspective) in main-taining the momentum of the process and pressures toward a quick conclusion. Political factors were also highly significant when problems of non-compliance with the terms of the negotiated agreements came to a head under the Reagan Administration. In June of 1982, the Department of Education indicated that it was prepared to take a firm stand to support the enforcement of the 1977 Agreement, despite the Board's claim that it was unworkable and unfair. This decision apparently reflected a continuing, long-term institutional commitment, despite the various changes of administration, to enforce strongly faculty integration mandates in all parts of the country. Senator D'Amato's intervention at this point was forceful and effective. He publicly claimed credit for using political leverage to bring about a withdrawal first of OCR's enforcement actions, and, five months later, of the agreement itself, in favor of a dramatically weakened new document.[21]

Local political factors were also important throughout the process. The prime such factor in New York was the influence of the United Federation of Teachers, probably the most powerful teachers union in the country. New York City was the home base for Albert Shanker, national president of the American Federation of Teachers, and a vice-president of the AFL-CIO, Shanker's influence on major educational policy issues in New York City were enormous.

Shanker's presence provides the most direct explanation for why New York's faculty assignment agreement permitted a gradual phase-in period and omitted any specific references to mandatory teacher transfers, the highly controversial factors that OCR managed to force on the boards in the other three cities. As Shanker himself reportedly said in declining to consent to a proposal found acceptable elsewhere: "New York is not Chicago."[22]

In Chicago, the teachers' union also had initially opposed the mandatory transfer concept and it tried "to deal on every level"[23] to block it. In the end, however, the union backed off from its opposition to the transfer policy and concentrated its efforts on assuring that the final agreement would protect the fundamental seniority concepts it had won in its contract.[24] (On these seniority issues, its views did largely prevail.)

In both Los Angeles and Philadelphia, the teachers' unions were not even involved in the initial stages of the negotiations.[25] They were advised of the basic plan only after the fundamental points, including mandatory transfers had been decided. Both the United Teachers of Los Angeles and the Philadelphia Federation of Teachers then accepted the forced transfers as a given and concentrated on working with the boards on implementation methods which would protect seniority and other prerogatives of their contracts.[26]

Developments in New York were also influenced by the Board's political sensitivity to allegations of civil rights violations. Although Gerry charged New York with deeply engrained instituational patterns of discrimination verging on racism, the New York Board's attitudes towards civil rights issues cannot fairly be equated with those of Southern school districts which actively opposed school desegregation efforts. For decades, the New York City Board of Education had prided itself as being in the vanguard of liberal civil rights reforms, and board officials deeply resented OCR's charges of racial discrimination. The Board's sensitivities were also influenced by a fear that racial tensions, which had erupted in the late 1960's around the issues of community control and school decentralization, but had diminished over the course of the interceding decade, might be activated again. For these reasons, the Board's sensitivity inclined it to seek an accomodation which OCR,[27] if at all possible.

The Board was especially willing to be conciliatory on the hiring/examination issues which had been an embarrassment to it for a number of years. New York's woefully low proportion of minority teachers and supervisors had become a focal point in recent years for investigative committees, advocacy groups, and court decisions. In the early 1970's, in comparison with cities like Chicago, Los Angeles and Detroit, where 30% to 50% of the teachers were minorities, in New York, only approximately 10% of the teachers (and 1% of the supervisors) were black or Hispanic. The New York City Board of Education tended to blame the quasi-independent Board of Examiners for this situation, and it supported a variety of legislative and litigation efforts to reform or eliminate the Board of Examiner system. Thus, on the examination issues, the Board's position was not far from OCR's; it was the teachers' union and the examiners who put up most of the resistance to OCR during the negotiations.

A final political factor that should not be overlooked was the influence of the particular individuals who played the major roles. The New York Review case study illustrates that the outcome of any implementation "game" will be strongly affected by the views and personalities of the main actors.

Gerry's influence was, of course, paramount. It was universally acknowledged that "the review was Martin Gerry's baby". He created a unique project in terms of the strongly result-oriented egalitarian approach that skirted the busing problem, the new applications of systems analysis and automtic processing to civil rights compliance monitoring. Gerry's intense commitment to this project persisted throughout his tenure: The Big Cities Review, and especially its New York component, was run directly from Washington because of Gerry's personal interest in overseeing every aspect of its operation. To ensure that his project could not be fully abandoned by the new administration, Gerry worked feverishly to issue the second letter of findings almost as President Carter was marching down Pennsylvania Avenue in his inauguration parade.

David Tatel's background as an experienced civil rights attorney and advocate also had important implications for the outcome of this process. He recast the issues into a more traditional civil rights framework. At the same time, he added a new dimension of professionalism and separation from day-to-day political pressures through his decision to retain experienced civil rights attorneys as outside consultants to pursue the negotiations. Tatel, and his consultant for the New York City negotiations, Nick Flannery, placed a high priority on establishing an atmosphere of mutual reliability and good will between the parties. They believed that a successful agreement needed to be based more on personal relationships and mutual commitments than on mandatory compulsory pressures. The structure of the final agreements (and their strengths and weaknesses at the complaince stage) clearly reflected these perspectives.

On the Board's side, Irving Anker's personal commitment to equal opportunity/integration causes, explains much of both his initial resistence to Gerry's charges, which he considered inflammatory and unfair, and his willingness to respond to the Tatel administration's more moderate stance, (especially on the ability grouping issues), by working cooperatively with OCR, to overcome admitted flaws in the system.

The outcome of the first agreement, however, was probably more influenced by the personality of Bernard Gifford, the Deputy Chancellor. Gifford influenced the process both through his personal role at the early stages and by the substance of the evidence and arguments he amassed on the compliance issues in his famous report.[28]

Gifford basically saw OCR as an ally in his longstanding attempt to achieve civil rights reform from within the school system. Although he, like the Chancellor and the Board, was committed to a basic equality of opportunity outlook, he was sympathetic to OCR's allegations on the hiring and faculty integration points; indeed, he had been a leader of the forces within the Board which had been attempting to reform the Board of Examiners' system. Gifford's personal commitment to these reforms (as well as the analyses he put forward which tended to refute some of the Board's major defenses, as, for example, the claim

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that most of the city's faulty imbalance was caused by the NTE alternative hiring system) undoubtedly was one of the reasons why the employment issues took on such importance in the New York region.

In sum, then, it was perhaps inevitable that most of the issues delineated by Martin Gerry at the outset of the Big City Review process would fall by the way because of their inherent lack of policy substance and the complexity of the organizational processes put into play. The fact that agreement was reached, nevertheless, on some major substantive issues such as faculty integration and student ability grouping, may be attributable to two primary factors: the strongly established policy standards OCR was able to invoke on these issues from Southern precedents and ESAA guidelines, and the play of various political issues including the Board's civil rights sensitivities, its relationship with the UFT (and the Board of Examiners) and the influence of various individual personalities. The fact that agreement was reached on these particular issues, however, was not the end of the story. The extent to which the particular reforms anticipated by the agreements were actually put in practice is a further critical part of the implementation process, to which we will now turn.

II. The Compliance Stage

A federal civil rights enforcement agency like OCR is limited, in its long-range ability to monitor compliance agreements, by its resources and the consistency of its political support. For these reasons, intervention by OCR can be expected to result in significant, permanent reforms only if the compliance agreement is either 1) a mandate for immediate statistically-definable changes, or 2) there is a mutual commitment with the school district to common reform objectives (especially when qualitative[29] educational reforms are involved).

The faculty assignment agreements in Chicago, Los Angeles, and Philadelphia were examples of agreements of the first type; the second New York City agreement on student ability grouping to a large extent reflected the second model. By and large, these agreements can be said to have been successfully implemented. By way of contrast, the first New York City agreement which fit into neither mold, still was substantially unrealized five years after it was signed, and, at that point, was "renegotiated" in a manner that essentially formalized the reality of non-compliance. OCR's negotiators in Chicago, Los Angeles, and Philadelphia seemed well aware of the elements needed for a successful agreement. Repeatedly, they told the boards of education and the union that they would accept almost any plan or any methods for achieving faculty integration--so long as the agreed plan guaranteed immediate compliance with OCR's specific statistical goals. Indeed, the agreement actually adopted in Chicago was almost precisely the same plan that the Board of Education had proposed and OCR had rejected ten months earlier. The critical difference in the final version was that the accepted faculty ratios would be put into effect at the start of the 1977 school term rather than over a period of years -- and on a definitive mandatory basis. Similarly, in Los Angeles and Philadelphia, OCR made clear that any mechanisms for seniority, voluntary inducements, and educational programming exceptions which the board and the union could agree on would be acceptable, so long as the requisite ratios were achieved immediately at the start of the next school term.

OCR's firm attitude prevailed in each of the three cities and massive mandatory teacher transfer operations were quickly put into place. In both Chicago and Philadelphia, during the short space of the summer vacation months, intensive computer programming of the relative seniority rights of all teachers in the system had to be effectuated, letters of reassignments sent out, and appeals from the reassignments processed.[30] In all of the cities, the mandatory transfers process created chaos, confusion, and substantial resentment. Joan Raymond, the Assistant Superintendent in Chicago, called the process "a monstrosity".[31] In Los Angeles, "parents marched, teachers resigned, people cracked up. There was a big rise in workman's compensation claims".[32] According to an official analysis of the impact of the faculty integration plan over a five-year period prepared by the Los Angeles Unified School District, that OCR agreement (which resulted in the transfer of more than 8500 teachers, including both voluntary and mandatory transfers), led to a doubling of teacher resignations and retirements in 1977-1978 and a tripling in 1978-1979; a doubling of attrition among teachers being transferred between 1976 and 1978 and in teacher turnover at mid-city schools averaging 35-40%.[33]

But whatever the cost in terms of teacher morale and systemic stability OCR clearly accomplished its goals of realizing specific proportions of faculty integration in the three cities where the mandatory transfer policy was promptly put into effect. Substantial compliance with these statistical norms have also been maintained in these cities in subsequent years.[34]

The New York City faculty integration plan, of course, permitted a three-year phase-in, and did not specify mandatory teacher transfers. Five years after the signing of the agreement, the established goals were far from being met. Only 9 out of 32 community school boards, for example, had met the Singleton standards.[35] Lack of effective implementation probably cannot fairly be attributed to any pervasive pattern of board of education intransigence or non-cooperation. To the contrary, Chancellor Macchiarola and his staff dedicated a considerable amount of effort and ingenuity into devising new mechanisms, such as a teacher reserve system, to promote integration.[36] Rather, it appears that the very passage of time permitted a number of critical factors to intercede into the compliance process and to render the original goals and expectations (if they could ever have been met without mandatory transfers) almost impossible of achievement.[37] With the passage of time, resistence to a possible mandatory transfer fallback option substantially increased -- to the point that political pressures finally led to the re-negotation of the entire mandate.[38] And OCR's inability to maintain consistent, and effective monitoring procedures also tended to undermine the likelihood of successful effectuation.[39]

In contrast to the strong pattern of non-compliance with the first agreement, however, the indications are that there has been at least some success in achieving the goals of the ability grouping provisions of the second agreement.[40] The latest figures show a decrease in unjustifiably racially identifiable classrooms from over 1900 to 142. This rapid reduction appears to reflect the fact that the ability grouping agreement was based on a consensus on goals among OCR and Board of Education officials, a consensus which has been accepted as an operating premise of the system. The lack of political visability and controversy of the issue, and the relatively straight-forward manner in which monitoring could be conducted by statistical reviews also undoubtedly aided compliance in this area.[41]

In the final analysis, ten years after initiation of "the largest civil rights investigation ever undertaken," the expenditure of millions of dollars and thousands of man hours, and the deflection of attention from numerous possible alternative enforcement areas, seems to have resulted in successful reforms in New York City in only one of the 13 original issue areas (and, in the other three cities, in effective compliance with established faculty integration ratios). Do these results justify the costs involved?[42] Or is consideration only of immediate "objective results"[43] an unfair measure of success?

It is, of course, impossible to definitively answer these questions. To some extent the definition of "success" is in the eye of the beholder. But some "objective" conclusions concerning the efficacy of OCR's activities can be obtained by comparing OCR's performance with that of other governmental agencies which have undertaken comparable attempts at egalitarian reform of large city schooling practices. Such a perspective will be provided by the comparative institutional analysis in the next chapter.

1 *See*, G. Bardach, *The Implementation Game*, (1977)

2 J. Pressman & A. Wildavsky, *Implementation* xviii (2d ed.1973).

3 *See* Ch. 5, *supra*, notes 1 and 28.

4 *See* discussion, Ch. 4, *supra*.

5 There was also agreement in September, 1977 on a "*Lau* Plan" to improve services for language minority children. This plan, however, added little to the Board's existing obligations under a federal court decree in the *Aspira* case. (In any event, the additional requirements never were implemented. Whitney Interview.)

6 Successful effectuation of the agreement has been achieved to date (apparently) only on the ability grouping issues. The agreement on discipline issues, called for monitoring and gathering information which might eventually lead to resolution of any problems in this area, but, as discussed in Ch. 7, this monitoring, so far, has been inadequate. *See* pp. 372-374, *infra*.

Of course, even without the effectuation of an Agreement, OCR's actions in raising many of these issues may have positively influenced future developments. About half of the OCR/ government respondents to our questionnaire thought that OCR's mere intervention helped improve comparability of services, and opportunities for female students and faculty. None of the Board of Education or interest group respondents agreed that OCR's involvement had affected resource allocations, three of thirteen thought there was some favorable impact on job opportunities for female supervisors, two thought OCR made a difference on resources provided to girls' athletic teams.

7 In Chicago, extensive negotiations led to agreement on a faculty assignment plan involving mandatory transfers and on extensive bi-lingual educational programming; as in New York, agreement was also reached on student ability grouping issues and the other Big City Review issues were essentially dropped. In Philadelphia, after agreement was

reached on a similar mandatory faculty transfer plan and bi-lingual issues, the other student services items (concerning many of which extensive evidence has been gathered), were not followed up. In Los Angeles, OCR again concentrated on a faculty assignment and bi-lingual issues, and in this instance did not even commence an investigation on any of the other issues.

Gerry testified in Caulfield that one pressure towards adding the assignment issues to New York was that their omission in New York undermined his position in Los Angeles and Chicago where school officials asked him why OCR was not taking action in New York. Trial Transcript, May 15, 1979, pp. 617-618.

8 Of course, the very fact that an administrative policy initiative is substantially dependent on the personality and presence of a single individual reveals a significant lack of "staying power."

9 In New York, but not in the other three cities, OCR's efforts were also deflected from the initial student services issues to a heavy concentration on the hiring procedures under the Board of Examiners licensing system. Considerations of prudence (confrontation with the teachers' union and the need to invalidate state law) and marshalling of evidence (the difficulties of proving test validation) had argued against pressing these issues. The strikingly disproportionate numbers of minorities hired in New York strongly impressed both Gerry and Tatel, especially since such patterns did not exist in the other large cities. But, in addition, it also appears that both OCR Directors were also influenced in their decision to persist with these issues by the clear policy standard against the use of unvalidated tests having disproportionate impact on minority job seekers, which had been established by Congress in Title VII and by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Essentially, OCR sought to apply these well-established Title VII policy standards to the more nebulous Title VI compliance process.

10 The precise manner in which the faculty integration and ability grouping standards actually came into the process and filled the goal ambiguity "void" was, of course, a function of organizational pro-

cesses and politics. Note, for example, that the complaint procedures given priority by the *Adams* decree, and the well established investigative methods for examining teacher assignment patterns, were "standard operating procedures" that had more staying power than the policy agenda Gerry tried to substitute into the Title VI void.

11 *See e.g.*, Pressman and Wildavsky, n. 2, *supra*, at 107-109; Bardach, n. 1, *supra*.

12 On the other hand, the fact that Gerry remained in a position to conceptualize and oversee the implementation of his project for over four years, gave the project an unusually long continuity of committed leadership.

13 414 U.S. 563 (1974).

14 401 U.S. 424 (1971).

15 413 U.S. 189 (1973).

16 418 U.S. 717 (1974).

17 426 U.S. 229 (1976).

18 The first letter did not even allege "intent" to discriminate. Also in his testimony at the *Caulfield* trial, Gerry argued that the *Davis* constitutional standard actually was no less stringent than the *Griggs* Title VII standard. Trial Transcript, May 15, 1979, pp. 777-779.

19 Note in this regard that OCR's extensive data on the issue of teachers with lesser experience being assigned to minority schools was scathingly rejected by the administrative law judge in Chicago. *In the Matter of Chicago Public School District No. 299, et al.*, Dkt. 5-120 (Feb. 15, 1977).

20 The interesting amalgamation of Title VI and ESAA standards was even more dramatic in Los Angeles and Philadelphia where the school districts had applied for substantial amounts of ESAA funding at the very time that OCR's Big City Review was being mounted. In those cities, the letters of findings issued by OCR, on their face, dealt simultaneously with Title VI and ESAA issues, and it was virtually impossible

to determine where allegations of non-compliance under one statute terminated and the allegations under the other began. See, e.g., letter from Floyd C. Pierce, Director, OCR Region IX to William J. Johnston, Superintendent of Schools, Los Angeles Unified School District, April 7, 1975.

Mr. Henry E. Boas, Program Planning Coordinator for the Los Angeles School District thought that as a matter of conscious strategy OCR decided to "use their biggest guns, the stringent requirements of the ESAA to cover everything." Boas further stated in this regard that a high OCR official had admitted to him that "once you file for ESAA, you come under a different category for review of your practices. ESAA criteria are much tougher."

21 The extent of Senator D'Amato's political intervention was unprecedented. Although Senators Javits and Moynihan had kept abreast of developments throughout the years of the New York Review, neither had directly or publicly involved themselves in the negotiations. Even Senator Moynihan's controversial speech on the Senate floor objecting to aspects of the 1977 Agreement had not been followed up by any substantive effort to overturn the Agreement.

22 Schonhaut Interview.

23 Healey Interview.

24 Conrad Harper, the private attorney who was conducting the negotiations in Chicago for OCR noted that at one major point during the negotiations, the union threatened to pull out all the stops and block the agreement. "They stood firm, hinted at strikes, and tried to approach Carter through the back door." According to Harper, all of a sudden, shortly after this confrontation, the Union "took a dive; they just went away." He attributed this turnaround to the fact that the President passed the buck on this issue to Califano and Tatel, who stood firm in backing him.

Mr. Healey, the Union President, related an incident that occurred in 1978, a year after the agreement had been reached and OCR was pushing for mid-year transfers to insure immediate compliance with the agreed ratios. Healey said he got to see Secretary Califano "through the offices of Shanker". It turned out that Califano's mother was a school teacher in New York and "he knew what we meant. He agreed to put off these transfers to September." By the next September, with new appointments, there no longer was a substantial compliance problem and no further mandatory transfers were necessary.

25 In Chicago, from the outset, the board of education officials briefed union officials on developments on a regular basis, although the union representatives were never permitted to personally sit at the table. In New York, by way of contrast, the union quickly got impatient with its initial background role and insisted that Shanker's chief assistant, Sandra Feldman, actively took part in the deliberations.

26 The United Teachers of Los Angeles was the largest teacher union in Los Angeles at the time, but, under California's "meet and confer" statute, it was not an excusive bargaining agent. UTLA was considered the most liberal of the teachers' unions and had a large minority constituency among its membership. The other Los Angeles teachers' unions tended to be more conservative and took a strong position in opposition to the agreement (one of the other unions, the Professional Employees of Los Angeles, commenced a litigation against the agreement which was dismissed by the courts. See Zaslawsky et al. v. Board of Education, 610 F. 2d 661 (9th Cir. 1979).

In Pennsylvania, the school district officials admitted they were surprised by the union's "amiability" in agreeing to talk immediately about implementation. These officials attributed the union's attitude to a psychological "softening up" after having lived with integration pressures for over ten years, and more specifically, to a fear of layoffs if federal funds were actually terminated; in addition, they remarked that the union was eager to obtain the additional jobs that would likely come with ESAA funding. John Ryan, the union president at the time, said that his cooperative stance was informed both by a fear of federal funding cutoffs and by on-going contract negotiations. (The racial balance issue became just an additional aspect of an exceedingly complex and difficult situation they faced with fiscal problems, layoffs, enrollment declines, and transfers.) Mr. Ryan was subsequently defeated in a re-election bid, and he, as well as the school district officials, believed that his conciliatory stance on the teacher transfer issue was a major factor in his defeat.

27 Assistant Superintendent Joan Raymond, who was the main representative of the Chicago Board of Education in its faculty assignment negotiations with OCR also spoke of that system's sensitivity to charges of civil rights violations. She said that the school system took very seriously the fact that it was being accused by the United States government of being in violation of the Constitution and she indicated that this sensitivity had a direct impact on the final outcome.

28 Gifford's advocacy within the ranks of the Board of positions supportive of OCR clearly had the effect of neutralizing much opposition which otherwise might have been generated. For example, the legal analysis contained in an appendix to the Gifford Report tended to accept Gerry's readings of the major cases, his assumptions that Southern precedents automatically applied in New York, and his discounting of the significance of *Washington v. Davis* and the shifting legal trends in 1976. If a separate legal analysis had been undertaken by the Board's Office of Counsel or the City's Corporation Counsel, the board might have taken a firmer line, and even risked going to court on some of the issues.

29 *See* Yudof, "Implementation Theories and Desegregation Realities," 32 Ala. L. Rev. 441, 463 (1981).

30 In Chicago, initially letters went out informing 1706 teachers that they were slated for mandatory transfers. Nine hundred and eighty-four appeals were filed and of these, 349 were successful, leading to the necessity for a "second pass" and the assignment of additional mandatory transfers to reach the agreed compliance figures. Chicago Public Schools Plan for the Implementation of Title VI of the Civil Rights Act of 1964 Related to Integration of Faculties, Assignment Patterns of Principals, and Bi-lingual Education Programs (October, 1977). In Philadelphia, where a larger number of teachers were moved on even shorter notice, even more mistakes appear to have been made. The union there brought a major arbitration

proceeding, claiming that in a substantial number of cases seniority had been miscalculated and the wrong people transferred. As a result of the union victory in this arbitration, many of the transfers had to be redone in February.

31 Dr. Raymond clearly took professional umbrage at having been compelled by OCR to rush through full implementation on only several months notice. She said she had warned them that "they would destoy the system. In the end, many scars were left." She thought it an unnecessary upheaval because the results could have been achieved on a phase-in basis.

32 Kresner Interview.

33 Memorandum from Robert Searle to Bill Lucas, dated April 20, 1981. Although the teacher transfer plan in Philadelphia also had a substantial detrimental effect on teacher morale, school board officials there expressed less continuing resentment years after the process had begun than was true in Los Angeles. In fact, Mr. Murray Bookbinder, Executive Director of the Philadelphia Board of Education's Office of Personnel and Labor Relations volunteered the sentiment that "in the long run, this may have been a plus." He believed that attitudes toward integration of a large number of teachers have been favorably changed with the passing of time and the stabilization of the transfer system. He acknowledged, however, that these attitudes did not include all teachers, especially those white teachers with substantial seniority who had been compelled to transfer to black school in "bad" areas.

34 Continuing compliance has been most effective in Philadelphia where both OCR and school district officials agreed that even without an active monitoring presence by OCR, the district has remained in compliance. Michael Aaronson, Assistant to the Executive Director, Philadelphia Board of Education, Office of Personnel and Labor Relations, took pride in noting that after the first year, the Office of Personnel "got the bugs out of the system" and now has the methods for calculating seniority and transfer rights "down to a science." "It all works rather automatically now".

In Chicago, OCR, on several occasions, informed the district that they were out of compliance in specific schools. These issues were negotiated sporadically for several years. Finally, in 1979, as part of the overall ESAA negotiations, the basic agreement was modified to allow certain substitute teachers to be counted in computing ratios and it was agreed that the system would then be in compliance. Letter from Patricia Roberts Harris to Dr. Joseph P. Havirer, September 15, 1979, Attachment p. 3. Robert Healy, the President of the Chicago Teacher's Union, reported that a small number of teachers also had to be transferred in September of 1981 because lay-offs resulting from the Board's fiscal crisis had upset the established ratios. Similar compliance problems in certain schools developed in Los Angeles in recent years and on several occasions the Board of Education requested a broadening of the ratio ranges. These modification requests however, were rejected by OCR.

35 Similarly, the major provisions of the examination system reforms also had not been effectuated. The Board (and UFT) had failed to secure legislative enactment of amendments to the eligible list exhaustion and rank order appointment laws, and they had failed to initiate "appropriate litigation" to achieve these ends. The labor pool study which was to establish parameters for the basic affirmative action hiring also was yet to be finalized.

36 Although an injunction against enforcement of aspects of the agreement which was in effect for approximately a year in the Caulfield case might be said to have delayed the date of full compliance, it cannot explain the extensive pattern of non-compliance more than two years after the anticipated target date, especially since the final result of that case was to uphold the validity of the agreement.

37 The New York City Board had planned to achieve compliance through assignments effectuated as part of the re-hiring process as the system was rebuilt after the massive lay-offs caused by the 1976 fiscal emergency. It turned out, however, that many fewer vacancies occurred than had been expected and there was a shortage of teachers willing to accept assignments in minority schools.

38 It is ironic, but fully understandable in this light, that talk of possible teacher transfers in New York aroused more intense publicity and political intervention (both from the liberal Democratic Sen. Moynihan and conservative Republican Sen. D'Amato) than did the actual fact of massive teacher transfers on a proportionately larger scale in Chicago, Los Angeles and Philadelphia.

39 It was also clear that OCR's monitoring operations were plagued by problems of poor organization, lack of follow-through, and inconsistent political commitment. Lines of authority between Washington headquarters and the regional offices were often unclear. Responses to Board of Education compliance reports or queries were delayed many months. A failure to renew the Delta Corporation's contract for data processing services in the 1980-1981 term denied OCR staff the data base needed to continue compliance monitoring. These problems have been exacerbated by a lack of continuity in OCR leadership. Between 1977 and 1982, OCR had six directors (Gerry, Tatel, Stewart, Brown, Thomas and Singleton) and two acting directors (Hamlin and Cioffi), and OCR was totally reorganized as its education branch moved to the new Department of Education.

40 The extent of actual compliance with the student suspension agreement is difficult to guage because of the incompleteness of OCR's data gathering and analysis in this area.

41 Note, however, if these statistics had indicated perpetuation or increase in the number of racially-isolated classes, it probably would have been impossible for OCR to sort out the various justifications for the suspect assignments. In other words, OCR's monitoring function was manageable mainly because there was compliance and no extensive follow-up analysis or intervention was required.

42 And how does one calculate the additional price paid in terms of teacher morale and educational instability in Chicago, Los Angeles and Philadelphia.

43 It is arguable that the New York teacher integration agreement, despite the failure to achieve

fully the original premise integration ratios, was "successful" because a lesser, but still significant, measure of integration was achieved without the turmoil and confrontation experienced in the other cities.

Note, however, that in our questionnaire responses, although 5 of the 8 OCR/government respondents thought OCR's intervention "improved" the hiring and faculty assignment issues, only 1 of 7 board of education respondents agreed as to hiring and 2 as to assignment; and only 1 of 6 interest group respondents responded positively on either issue.

CHAPTER TEN

COMPARATIVE INSTITUTIONAL ANALYSIS

The main concern of our comparative institutional analysis is to consider the extent to which OCR, an administrative agency, engaged in "legislative-type" policy making functions and "judicial-type" enforcement activities. How did OCR's policy-making and enforcement functions differ from the traditional prescriptions of separation of powers theory, and what is the significance of any such differences?

As we discussed in Chapter One, the present authors' previous empirical study of the role of the courts in educational policy making ("EPAC")[1] will be utilized as a basic comparative framework for studying these issues. Under this framework, the "legitimacy" of OCR's policy making functions will be considered in terms of the types of principles or policies that are formulated and the extent to which various interest groups are granted access to the policy making process. OCR's capacity both for articulating and realizing policy goals will be analyzed primarily in terms of its abilities in regard to investigative "factfinding" and in effectuating remedial reforms.[2]

I. Principle/Policy Formulation

One of the main issues analyzed in the EPAC study was whether judges exercise policy-making prerogatives which properly belong to the executive or legislative branches. We concluded that they generally did not, because in the overwhelming majority of cases we studied, judicial decision making was done in accordance with established constitutional or statutory "principles", rather than in accordance with legislative type political policy making. (We did note, however, that the "domain" covered by constitutional and statutory principles has expanded dramatically in recent years.)[3]

Because of the fundamental lack of clear policies or principles in Title VI or the applicable court cases, OCR was, in essence, "delegated" with the responsibility to define the basic egalitarian concepts in the course of its enforcement of Title VI. Although this delegation was "indirect" (in that it stemmed from a definitional void in the statute rather than from an express Congressional mandate to delineate standards), the critical significance of the equality issues at stake and the fact that the standards were formulated at the operational level in the course of issuing letters of findings and negotiating agreements, rather than through more traditional administrative rule making or adjudicative processes, greatly enhanced the significance of OCR's policy making role, as compared with traditional administrative agencies[4] or even other civil rights enforcement agencies.[5] What types of principles or policies are formulated through such a process? Do they closely resemble the ones developed in legislative or judicial decision-making processes or do they constitute a conceptually distinct approach?

Legislative policy making consists of "mutual adjustment" process in which competing political pressures are balanced to reach compromise solutions.[6] Although political give-and-take certainly was involved in the OCR decision-making process, "the array of political influences and constituencies" were markedly different from those affecting Congress,[7] and their influence here was decidedly less central. OCR's approach appeared to be closer to the strong assertion of rights that characterizes the "principled" judicial process. Indeed, as we concluded in chapter Eight, the New York City Review achieved a unique reconciliation of equality of opportunity and equality of result "principles." The unique result of that "reconciliation," however, indicates that although the process was "principle oriented," it was qualitatively different from the judicial approach.

The nature of this difference is paradoxical. On the one hand, because, in comparison with a court, OCR was less of an "impartial decision-maker" and more of a "prosecutor-advocate," its basic position was more ideological and confrontational. On the other hand, because the final policy decisions emerged through a negotiated process, they were more pragmatic and flexible than the principled liability holdings of a court.

In its original delineation of the issues agenda and in its allegations in the letters of findings, OCR's posture reflected a strong, almost rigid, ideological stance. The OCR officials were, in essence, prosecutors who felt a moral duty to enforce vigorously the civil rights law. As Jeremy Rabkin has put it, "the civil rights perspective seems to preclude the weighing of countervailing claims."[8] Especially after the agency's experience in the Southern school desegregation battles, many OCR leaders (including, according to most board of education officials, Martin Gerry) became to a greater or lesser extent committed "ideologues."[9] Even more moderate OCR leaders, like David Tatel, tended to come to their positions from a civil rights advocacy background; few of them were disinterested "generalists." OCR officials, therefore, tend to have a commitment to basic ideological goals which are not easily modified or compromised.[10]

But OCR as an administrative agency had to combine its prosecutorial function with an "impartial" regulatory role. That is, after it issued its allegations and findings, it had to change hats and attempt to assess fairly the Board's response and promote a conciliatory negotiating process. In this "impartial" role, OCR, in one sense, still was more ideologically consistent and less flexible than a court because of its national perspective. The commitment to maintain uniform compliance standards for all school districts throughout the country[11] caused OCR's approach to be less grounded in the immediate problems and facts of the particular case than is the incremental judicial process.

But, in another, and deeper, sense, the expertise of OCR's staff regarding school administration and its detailed knowledge of the facts in particular school districts, gave it a pragmatic, grassroots orientation that is lacking in the judicial process. A critical point here is that the moderating pragmatic influences of the negotiating experence occurred at the "liability" stage of the process. Although important issues are also negotiated by the parties themselves in new model institutional reform litigations,[12] those negotiations usually take place only at the remedial stage, after the basic principles have been defined by an initial liability decision. Thus, equality of opportunity and equality of result ideological strands could be pragmatically balanced in the OCR process in a manner that did not occur in the court cases because the conciliatory give-and-take occurred at the stage of formulating the operative principles and not merely at the stage of devising remedies to effectuate a previously articulated decision.

The ability grouping negotiations and agreement illustrates the qualitative difference between the formulation of principle in administrative and judicial processes. Although OCR did not compromise its principled commitment to end the disparate impact of tracking practices on minority students, it was able, unlike the court in Hobson v. Hanson,[13] to understand and accept "educational justifications" for continuation of a flexible ability grouping system, and it was even able to moderate the strict requirements of its own ESAA regulations by permitting exceptions to "objective" placement assignments on the basis of "teacher judgment."

In short, then, the articulation of principles or policies through the administrative process is conceptually quite distinct from legislative or judicial models. It is more ideologically consistent than the "unstructured pulling and hauling" of the legislative process, but more pragmatic and flexible than the "structured process before a neutral decision arbiter" of the judicial process.[14] It contrast to the "mutual adjustment" decision-making mode of the legislature and the "rational-analytic" decisional process of the courts, we would term this intermediate administrative approach, "pragmatic-analytic."

II. Interest Representation

A key question concerning the legitimacy of judicial or administrative policy making roles is whether the interests of all those likely to be affected by a decision are sufficiently taken into account. Traditionally, the legislature has been viewed as the prime arena for articulating public policy issues because all affected views and interests are thought to be represented during its deliberations.

Although opponents of judicial activism often assert that few of the concerned parties participate in the judicial process, our EPAC study did not support that view. Rather, we found both a great breadth and broad variety of interests represented in court proceedings. Furthermore, our comparative legislative/judicial case studies indicated that on similar public policy issues virtually the same parties that appeared before the courts also participated in the legislative deliberations and all of the viewpoints raised in one forum were also raised in the other.[15]

By way of contrast, a striking aspect of the OCR compliance process, not only in New York, but in all four of the Big City Review locales, was the absence of direct participation by representatives of the myriad groups that clearly had a stake in the outcome. In New York the teachers union was the only additional participant in the negotiations.[16] In the other cities, not even the union representatives were permitted to take part directly in the bargaining.[17]

The issue of interest group involvement in OCR investigations is complicated by the agency's multiple roles. To the extent OCR acts as a prosecutor, the traditional prosecutorial model would hold that a complainant who initiates an action should not expect to participate further in the investigation, presentation of charges, settlement negotiations or trial. From this viewpoint, compliance reviews initiated by the agency itself should raise even fewer expectations of involvement by outside parties. As a practical matter, however, hardly anyone (including, in large part, OCR officials) readily accepts this model. A criminal prosecutor's clients are the public at large and the government; OCR's primary reference groups, on the other hand, were the minority group beneficiaries of federally funded programs. Both on the local and national level the representatives of these groups expect OCR to act as an advocate for their interests.

The school districts and the unions, and other professional and civic organizations that tend to side with them in civil rights matters, however, tend to see OCR as a governmental regulatory agency which has an obligation to act impartially, and not on behalf of any particular interests.

Given the complexities of these role expectations, it is not surprising that over the course of the New York Review, OCR estranged every significant educational interest group in the City. In the beginning, the Big City Review model, although condemned by national civil rights organizations as a diversion from higher priority enforcement activities, was greeted by New York City minority representatives with some interest. Gerry indicated that he wanted OCR to relate to the local groups as would a public interest law firm. The high point in this relationship came when Gerry responded to administrative complaints from the NAACP and NYCLU and added to the agenda the employment discrimination issues that he had, until then, scrupulously avoided.

From that point on, however, minority interest groups became increasingly dissatisfied with their access to the process. They were shocked by Gerry's finding that the lay-offs were not discriminatory and they claimed that they had not been consulted by OCR in its data analysis. After Gerry left office, the local advocacy groups experienced one disappointment after another: the withdrawal of the student services letter; the exclusion of minority advocates from the employment negotiations; the dropping of many issues in the revised student services letter; and the failure to enforce vigorously the employment agreement.[18]

An integral part of this deteriorating relationship was a basic disjunction between the issue priorities of OCR and the local groups. Hiring rather than staff assignments had historically been the main concern of the New York civil rights groups. They had repeatedly instituted lawsuits and legislative action to reform the Board of Examiners; they had never raised faculty racial imbalance issues or challenged the assignment implications of the alternative hiring system (which, in fact, they favored). Similarly, no local advocacy group had ever raised the issue of ability groupings.

Under these circumstances, there was a virtual consensus among the interest groups that their representation in the process was inadequate. Most of the representatives of these excluded organizations felt that their organization's points of view were not fairly considered during the negotiations.[19] These perceptions of unfairness were intensified by the knowledge that the teachers' union had become a participant in the negotiations. In response, some of these organizations sought out the courts. Opponents of the teacher agreements began the Caulfield case and proponents, the NYABE litigation.

It is not, however, clear precisely what form increased interest group involvement could have taken. Most group representatives recognize that granting them full "party" status had the danger of turning the negotiations into a "circus".[20] Consequently, they have spoken in terms of some kind of ongoing consultative role.[21] Such a consultative role might have served a number of purposes. First, the groups could have provided information and perspectives on specific issues under negotiation which were otherwise unavailable. Second, involvement would have lessened the level of misunderstanding and estrangement by acquainting groups on both sides with the hard choices and the considerations that went into the ultimate compromises. Third, participation may have promoted a commitment of the interest groups to the implementation process, which might have increased the chances for successful compliance.[22] Finally, at the least, participation may have avoided some or all of the Caulfield litigation, which consumed substantial time, energy and resources at a critical time in the implementation process.[23]

The judge in Caulfield, Jack Weinstein, strongly believed that broad participation by affected groups was essential. He initially issued an order which would have invalidated the first agreement precisely because it had resulted from "secret, informal negotiations conducted exclusively by a handful of government officials."[24] Although Title VI and the HEW regulations nowhere specifically provided for participation by affected interest groups or for hearings regarding the terms of the proposed voluntary compliance agreement, Judge Weinstein ordered HEW to provide an appropriate procedure for public comment because he believed that:

> "The huge power concentrations and the bureaucracies of our governments must not be permitted to be exercised secretly and arbitrarily. No matter how benign and well intentioned, those government officials who can, in practical effect, turn on or off

> the source of hundreds of millions of dollars, must conduct themselves with scrupulous regard for procedural protections...if people are to retain their faith in government."[25]

On appeal, however, the Court of Appeal for the Second Circuit reversed Judge Weinstein's order. There was no basis, it held, for creating a due process hearing right where Congress had not provided for one. The question remains, however, whether Judge Weinstein's comments, though now lacking binding legal force, nevertheless remain persuasive as a matter of public policy.[26]

III. Factfinding

The initial factfinding question raised in the judicial activism debate concerned the courts' ability to obtain sufficient information on the complex social science issues involved in educational policy disputes. Our EPAC data indicated that the judicial discovery process (by which lawyers can request or subpoena any relevant documents) constituted an effective information gathering technique. The comparative judicial/legislative case studies further revealed that the evidentiary records accumulated in the court cases were more complete than the factual data obtained through hearings and other methods of the state legislatures.[27]

If it is true that the judicial factfinding capability is more extensive than that of the legislature, the OCR/NYC case study indicates that the administrative factfinding capability may be even more substantial than that of either of the other branches -- at least where as commitment is made to mount a major investigation as in New York.

Unlike a court or a legislature, OCR was not primarily dependent on attorneys or interest groups to generate its information. It mounted a substantial data gathering operation of its own, an operation that was indeed impressive. It included substantial manpower commitments, technological resources (data processing services and equipment); and significant legal authority to require substantial record keeping and reporting from school districts.[28] Data gathering and information assessment was carried out in a variety of ways -- original field investigation, collating of publicly available data sources, preparation of findings, position papers, and negotiations.[29]

Although it is difficult to fault the extensiveness[30] of OCR's factfinding processes in the New York investigation, questions concerning the quality of the data gathered, and the objectivity of OCR's use of it, have been raised repeatedly. Clearly, OCR initially approached its data analysis tasks from a prosecutorial perspective. The fundamental premise of the Big Cities Review methodology was that an urban school system controlled by white constituencies would make decisions, consciously or not, that caused minority children to receive inferior educational opportunities. Since Northern school systems -- especially

New York -- were adept at articulating non-discriminatory policy reasons for programs which had discriminatory effects, the reviews were designed primarily to ferret out and correlate "objective" evidence of disparate treatment. In this way, the very methodology of the reviews reinforced the initial ideological perspectives of the OCR officials.

OCR investigators also have been criticized for a tendency to approach the issues in overly-statistical terms. As one Los Angeles school official put it:

> "They collect mountains of data. Especially computer programs. But their approach is like throwing material against the wall. What sticks, they look at."[31]

Despite these allegations, however, the actual use of the date in the negotiating and decision making process appears to have been well targeted by the more impartial and pragmatic mode of OCR's approach to the issues in its "regulatory" role. We note in this regard that in the Caulfield litigation, where OCR's evidentiary findings were strongly attacked, its findings were corroborated by both the Gifford Report and reports of Dr. Steven Michelson, an independent expert hired by the Justice Department, and were validated by a judge with a national reputation as an evidentiary expert.[32] Specifically the New York Review undertook complex social science data analyses and supplied definitive answers to a number of important and controversial educational issues including the following:

1. The massive teacher lay-offs caused by the fiscal crisis did not disproportionately affect minority teachers. This finding contradicted the common sense view that minority teachers generally were "last-in" and therefore must be "first-out", a belief widely accepted by minority group advocates and school board officials alike. This unexpected finding forced a reconsideration of the ethnic complexities of the personnel system.

2. Thousands of school children were placed in racially identifiable instructional settings. Many of these placement were clearly unjustifiable. Many others were the result of ability grouping practices that were educationally dubious at best. Although the Board originally attacked OCR's findings, investigations by their own advisory panels caused them to accept many of OCR's findings.

3. There were no striking disparities in the allocation of educational resources among predominantly minority and non-minority schools.[33]

In short, it would appear that the administrative agency factfinding capability is potentially superior to that of the legislature and the judiciary. However, it is not clear how often resources will permit this extensive investigative capacity actually to be mounted, or whether an inherent adversarial bias, may at times, distort the accuracy of its findings.

IV. Remedies

When either a court or an administrative agency has found a major compliance problem and takes steps to "remedy" it, a substantial degree of interference with the normal, day-to-day operations of the affected school system will necessarily result. Our EPAC study indicated, however, that such intrusion by the courts, generally speaking, was less extensive than is commonly assumed. In relatively few cases were extensive, intrusive reform decrees actually issued.[34] Where they were issued, since the defendants or related public agencies substantially participated in their formulation, we concluded that the courts serve largely as catalysts and mediators for processes that are basically undertaken by the affected school officials themselves. Furthermore, the extent of compliance with these court orders was relatively high.[35]

Comparing OCR's remedial capabilities with these judicial findings, we would conclude that OCR's implementation is both more intrusive and more successful when it obtains immediate, statistically measurable agreements (as in Chicago, Philadelphia and Los Angeles). However, where an OCR remedial agreement permits phased-in implementation over a period of years, as in New York, its "staying power" appears to be significantly less than that of the courts, and consequently the degree of its success is diminished. These conclusions seem related to two main areas of institutional differences between OCR and the courts: sanctioning powers and institutional continuity.

A. Sanctions.

Courts have available to them a wide range of coercive tools that can be fine-tuned to the needs of particular remedial situations, ranging from modest injunctions against particular policies or practices to putting an entire system in receivership, or holding school officials in contempt.

Instead of such injunctive or contempt powers,[36] OCR has available two major sanctions: to cut-off all funds for existing federally supported educational programs after completion of various compliance proceedings and judicial review or to defer new federal funding pending completion of compliance proceedings. Both of these sanctions were applied effectively in the South between 1964 and 1968.[37] In that situation, however, there was a strong political consensus supporting prompt action, the school district violations were beyond dispute, and the advent of numerous new federal education programs permitted easy utilization of the deferral sanction.

In the North, however, both Title VI sanctions had diminished credibility. The failure of Commissioner Keppel's early attempt to impose the deferral sanction in Chicago made a lasting impression on OCR officials. The fund termination sanction, which could involve tens of millions of dollars (and would cause most harm to the very minority group students OCR sought to help), was perceived by most OCR officials (and also understood by many school personnel) as too much of an "atom bomb" realistically to be put into effect.[38] By the time the Big City Review process had gotten underway, OCR had not, in fact, attempted to terminate funding for any school districts, North or South for a number of years.[39]

One of the most interesting findings of our study of the Big City Reviews was the manner in which OCR essentially compensated for its practical inability to actually invoke the Title VI funding termination sanction by utilizing the lesser, but more credible, threat of denying eligibility for funding under the Emergency School Assistance Act (ESAA). We noted in Chapter Nine the manner in which the result-oriented ESAA standards essentially became merged into Title VI requirements during the implementation process. The power to declare districts ineligible for ESAA grants was similarly transformed by OCR into a supplementary sanction which was relied upon repeatedly in Title VI negotiations. Thus, ESAA, which had been intended by Congress to be a "carrot" to induce voluntary desegregation became OCR's main "stick" for enforcing prompt compliance with Title VI orders.

ESAA offered several attractive features. It avoided the Title VI credibility problem because ESAA grants were large enough to involve significant funds but were small enough that a declaration of ineligibility would not totally devastate all federally funded programming.[40] Also, the grant process was built into a yearly refunding cycle which permitted ongoing monitoring and compliance follow-up. Furthermore, the application process proceeded on specific time schedules. An applicant declared ineligible (and not granted a waiver) would forever lose its earmarked funds -- thus, the deprivation of funding was at least as immediate as Title VI deferral but it constituted a final, and not an interim, denial.

There is little doubt that the imminent threat of a loss of ESAA funding was the main sanction that led to acceptance of the strong mandatory teacher transfer agreements in Los Angeles and Philadelphia, and it was also a substantial factor in Chicago. In New York, the situation was a bit more complex. Both our interviews and questionnaire responses indicated that ESAA sanctions were more important in New York than the remote threat of a Title VI funding termination, but even the possible ESAA deferral or loss was not viewed by New York officials as a calamity that had to be avoided at all costs. Because the New York school system was decentralized, many of the community school districts who had applied for ESAA grants were able to obtain their funding by promising to meet the Singleton standards immediately. Thus, the New York system, as a whole, was able to defuse much of the effect of the ESAA sanction by obtaining partial funding.

To the extent that an OCR sanction threat can be said to have induced the New York Board to accept an agreement it otherwise might have delayed or rejected the relevant one was the Labor Department's threat to defer (under Title VI) that part of a grant to New York City under the Comprehensive Employment Training Act (CETA) which was earmarked for the Board of Education.[41] The CETA funds were expected to permit the rehiring of 1,200 teachers. Unlike the "atom bomb" threat of a total funding termination, the CETA sanctions (like the ESAA sanction in other cities) was limited and therefore credible.[42]

B. Institutional Staying Power

One of the reasons that courts involved in institutional reform litigations are preceived as being highly "instrusive"[43] is simply that they tend to maintain an active presence in a case for an extended period of time.[44] So long as the court retains jurisdiction of a matter on its docket, attorneys for any of the parties may request a hearing to complain of implementation delays or about unanticipated problems that arise.[45] In addition, judicial decrees normally contain extensive reporting requirements which not only call for periodic data submissions on compliance by the defendant school districts, but also provide regular opportunities for on-going judicial scrutiny.

An administrative agency like OCR lacks such inherent staying power. Its "docket" is heavily influenced by changes in political priorities, and by shifts of resource allocation to new issues and new crises. A realization of the limits of their institutional capabilities in this regard may explain why OCR officials rejected the pleas of school officials in Chicago, Philadelphia and Los Angeles for more time to implement massive mandatory teacher transfers in "an orderly manner". They may well have realized that if immediate compliance was not effected, the likelihood of achieving their objectives in the long run would be slight.

The history of implementation of the New York agreement well illustrates OCR's problem in this regard. Overall, the record of compliance with the phased-in New York agreements was poor. Not only did OCR and the Education Department delay taking any concerted action regarding teacher assignment non-compliance until years after it was clear that New York City would not meet the 1979 interim goals nor the 1980 final goals, but also, once the findings of non-compliance were about to be issued in 1982, this action was delayed by political pressure, and shortly thereafter, the agreement was "re-negotiated" to the point of virtual abandonment.

In regard to the second agreement, although there was a certain degree of on-going monitoring of the ability grouping and discipline provisions by OCR's regional office, it lacked the resources and capability to analyze in any systematic way the data and explanatory information it had obtained. To the extent that the statistics obtained reflect improvements that have occurred, the process had been successful, but to the extent that the accumulated data needed to be analyzed and acted upon, OCR did not demonstrate a capacity for doing so.

Furthermore, even if OCR officials had been more diligent and effective in their monitoring activities, they could not have moved as promptly as a court to modify the agreement, or to require the school district promptly to comply. OCR had no direct contempt powers comparable to those of a court. Its closest option would be to have the Justice Department commence a litigation to seek enforcement of a compliance agreement as a contractual obligation.[46] OCR's only alternative course of action would be to recommence a lengthy process of investigation and threatened reinvocation of the Title VI deferral and fund termination proceedings.[47]

In short, then, a court, as compared with OCR, is better able to monitor compliance on a long term basis and to respond to unforeseen developments that arise during the implementation process. OCR's institutional capacities are better geared to enforcement of reforms that can be effected on a quick, single-stroke basis.

1 M. Rebell & A. Block, *Educational Policy Making and the Courts: An Empirical Study of Judicial Activism* (1982) (hereinafter EPAC).

2 An interesting overview perspective on these issues is provided by the responses to the items in our questionnaires dealing with comparisons of OCR and judicial activities in educational policy reform. Almost all the respondents (who included approximately equal numbers of OCR/government, board of education, and interest group officials) thought that judicial involvement in day-to-day school operations was more "intrusive" than that of OCR, but that the court decrees were also more likely to be effectively implemented. The overwhelming majority of board of education and interest group representatives also stated that the judges understood educational policy better than did the OCR officials; (perhaps not unexpectedly, however, the OCR/government respondents unanimously rejected that proposition).

The specific responses to the questions posed on these issues in the questionnaire were as follows:

	Strongly agree	Moderately agree	Moderately disagree	Strongly disagree
1. In general, the courts seemed to interfere with day to day school operations more than did OCR.	6	10	3	0
2. In general, the judges seemed to understand NYC educational policy better than did OCR officials.	3	6	9[a]	2
3. In general, the court decrees seemed to be implemented more effectively than the OCR agreements.	5	9	1[b] 2	1

a) Seven of the 9 "moderately disagreeing" and 1 of the 2 "strongly disagreeing" were OCR/government respondents.

b) One respondent's answer was "on the line".

3 *See* EPAC, *supra* n. 1, Chs. 2 & 10 for a fuller discussion of these points. The *EPAC* study utilized the following definitions:

> "*Principle*: A statement establishing a right of an individual against the state or against another individual (or, less frequently, the right of an institution to maintain the integrity of its legally defined prerogatives). A principle is expressed as a general rule that should be enforced whenever applicable, regardless of social welfare consequences, except when it is outweighted by a countervailing principle." *Id*. at 23.
>
> "*Policy*: A statement concerning collective goals. Policy arguments consider the relative importance or desirability of particular methods for achieving such goals. A policy statement is normally expressed in more specific terms than is a principle, and in a particular context it may be subordinated to competing policy claims that are determined to be better able to serve collective goals more effectively." *Id*. at 24.
> *cf*. Rebell, "Judicial Activism and the Courts' New Role," 12 Social Policy, No. 4 p. 24 (1982).

4 As indicated in Chapter One, n. 34, *supra*, the administrative law literature tends to emphasize the importance of formal rule making procedures, adversary procedures and judicial review mechanisms for ensuring the accountability of agency policymaking. Title VI, in theory, would appear to have provided such strong procedural restraints. HEW was granted rule-making authority, subject to formal Presidential approval; individual case enforcement had to pass scrutiny in adversary procedures before an administrative law judge; and all of its enforcement powers were subject to judicial review under the Administrative Procedure Act (with the specific proviso that Title VI sanctions were *not* decisions committed to agency discretion). Any final decision to wield its ultimate funding termination sanction was subject to additional political scrutiny by both the President and the Congress.

The major policy decision in the Big City Reviews ostensibly involved investigation and application of pre-existing compliance standards to a new geographical and subject area setting. In fact, however, the application of result-oriented desegregation guidelines and ESAA regulations to Northern cities and to new student services issues without prior findings of _de jure_ or intentional segregation constituted a major policy decision. The indirect manner of this decision making process through an investigative and negotiating process tended to nullify the accountability protections established by the formal procedural mechanisms.

5 Compare in this regard the Equal Employment Opportunity Commission, in enforcing Title VII of the 1964 Civil Rights Act was limited to individual case investigation, conciliation and referral of enforcement issues to the courts. Unlike OCR, EEOC had no independent adjudicating responsibilities, sanctioning authority or rewarding capabilities. See J. Freedman, _Crisis and Legitimacy: The Administrative Process and American Government_, Chapter 8 (1978). _See also_, Blumrosen, "Anti-Discrimination Laws in Action in New Jersey: A Law-Sociology Study," 19 Rutgers L. Rev. 191 (1965), Urban League of Rochester, New York, Inc., _The Effectiveness of the New York State Division of Human Rights as a Civil Rights Enforcement Agency_ (1977).

6 _See, generally_, C. Lindblom, _The Intelligence of Democracy_ (1965).

7 Schuck, "The Graying of Civil Rights Laws: The Age Discrimination Act of 1975," 89 Yale L.J. 27, 81 (1979). Although OCR as a "dependent" administrative agency obviously is not immune from political pressures, the influences to which it responds are national, rather than local, and therefore are more indirect. The insulation of the negotiations in New York and Chicago from political pressures was further enhanced by the use of independent outside counsel as OCR's chief negotiators.

8 Rabkin "Office for Civil Rights" in the _The Politics of Regulation_ 331 (J. Wilson, ed. 1980).

9 Paul Peterson's definition of the "ideologue" seems apt here:

> "He is generally unpersuaded by group pressures, noisy demonstrations, lengthy public hearings, detailed private communiques. His political position is likely to be shaken only if (1) expert testimony indicates that the goal he is pursuing will not be achieved by the means he intended to employ, or (2) individuals or groups with a known ideological preference that is similar to his have taken a contrary position on the issue at hand. The ideologue is not interested in compromise for its own sake; he will only compromise if forced to do so by the political power of the opposition. The ideologue sees the issues as conflicts over principles rather than as competition among specific interests. Convinced of the correctness of his position, the ideologue is not likely to stray from it when subjected to the traditional tactics and strategies of group politics. Rather, he will become angry with the 'presssure' being placed upon him and will feel that it is his duty to stand up against these pressures." P. Peterson, *School Politics Chicago Style* 53 (1976).

10 OCR's posture undoubtedly was perceived by the board of education as being more confrontational than would be the principled stand on analogous issues taken by plaintiffs or their attorneys in a civil rights litigation. (Note in this regard OCR's consistent rejection of the NTE alternative hiring system which plaintiffs in the previous court cases were willing to accept.) Plaintiffs can, of course, bring strongly-honed arguments to a litigation, and may assert extreme or even radical interpretations of applicable legal principles. But, private attorneys lack OCR's aura of governmental legitimacy, and its power to impose substantial sanctions even before administrative or judicial review has been invoked. Under these circumstances, principled positions taken by OCR clearly have intensified impact.

11 *See* Rabkin, *supra* n. 5, at 331-332 for a detailed discussion of further implications of OCR's national rule-making perspective.

12 See *EPAC*, *supra*, n. 1, pp. 210-212 for a discussion of the manner in which the parties substantially participate in the formulation of judicial remedial decrees in such cases.

13 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, *Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

14 Diver, "Policy Making Paradigms in Administrative Law," 95 Harv. L. Rev. 393 (1981).

15 *See* EPAC, *supra* n. 1, chs. 3 and 10.

16 Representatives of the Board of Examiners also managed to participate in the discussions on the hiring issues.

17 There did not appear to be any principled basis for including the union but not other groups in the New York deliberations (or, for including the union in New York but not in the other cities). Clearly, the UFT gained access because of its extensive political influence. The fact that the UFT was given this privileged status heightened skepticism about the agreement among many of the advocacy groups in New York City and made them suspicious of the compromises OCR accepted on many key points.

18 OCR's lack of sustained involvement with its minority constituencies and its apparent failure to reflect their priorities was also evident in Chicago where the faculty assignment ratios it insisted upon would have the result of guaranteeing a white faculty majority in every school in the city. Black community groups and leaders such as Jesse Jackson reportedly spoke out against this result. (Healy Interview)

19 In our questionnaire responses, four of six interest group representatives said that OCR did not adequately consider their views and three of five (one did not respond to this question) felt that the board did not.

Eleven of twenty-one respondents on our questionnaires indicated that a number of organizations, especially Advocates for Children and the Public Education Association, had attempted to participate in the review process and the negotiations, but they were rebuffed.

20 Interview with Arthur Eisenberg, Esq., New York Civil Liberties Union. Prof. Steward in his classic article, "The Reformation of American Administrative Law," 88 Harv. L. Rev. 1667 (1978) considers at length recent trends to expand

interest representation in the rule making process as an accountability mechanism that might legitimize the trend toward broad delegation of policy making authority to administrative agencies. He concludes that interest representation is ineffective for this purpose because of problems such as the difficulty of assuring that all interests are adequately represented and the delay and indeterminacy that expanded participation adds to the rule-making process. Stewart's findings may be less relevant to an investigative-negotiating process, like the New York Review, where the number of affected interests is more limited. The issues are more clearly defined, and as indicated in the text, the modes of possible participation are more flexible.

21 Compare in this regard Beryl Radin's suggestion that minority group representatives be accorded a formal participatory role in negotiated settlements of Title VI charges. To assure proper representation, she proposes creating a procedure for designating a class representative. See B. Radin, Implementation, Change, and the Federal Bureaucracy: School Desegregation Policy in HEW, 1964-68, 138 (1977).

22 David Tatel noted that minority advocacy groups were very helpful in monitoring of OCR agreements regarding desegregation of colleges and universities. Note in this regard the important role played by Advocates for Children in monitoring the discipline component of the second New York agreement.

23 Caulfield was brought initially by community school board representatives who had not participated in the negotiations on the first agreement and strongly opposed its contents. Note also that in Los Angeles, litigation was commenced by individual teachers and splinter teacher union groups who were not affiliated with the main teacher group that participated in the process, at least in its later stages.

24 Caulfield v. Board of Education, 449 Supp. 1203, 1207 (ED. N.Y.) rev'd, 583 F.2d 605 (2d Cir. 1978).

25 449 F. Supp. at 1206. Judge Weinstein also stated that:

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> "The people have a right to know what is going on and to express their views, however misguided they may appear to those who control the government's operation . . . It gives even those who have lost a public argument the sense that they have had their say. It creates feelings of mutual respect and fraternity without which freedom and internal peace cannot survive." (Id. at 1225).

26 Although Judge Weinstein's order requiring greater participation in the administrative process was reversed, he clearly practiced what he preached in terms of allowing full participation in the follow-up court proceedings in Caulfield. The original parties to the suit were six community school boards and individual teachers and supervisors who claimed the first agreement violated their rights. Defendants were the Board of Education, HEW and the State Commissioner of Education. The Court granted motions to intervene on behalf of the UFT, the Council of Supervisors and Administrators, three additional community school boards, the Coalition of Concerned Black Educators, and four individual black teachers. In addition, friend of the court briefs were permitted to be filed by the American Jewish Congress, the Anti-Defamation League of B'nai Brith and an individual.

27 See EPAC, supra n. 1, chs. 4 and 10.

28 45 C.F.R. §80.6. In New York OCR received extensive cooperation from the school system in its data-gathering efforts. When some community school districts refused to cooperate in the collection of certain racial data, Chancellor Anker (albeit somewhat reluctantly) acted to supersede them pursuant to his powers under N.Y. Ed. Law 2590-l. Ultimately, despite the Chancellor's cooperation OCR needed a court order to obtain the desired data.

29 The magnitude and complexity of the data-gathering tasks which Martin Gerry set out for the project were enormous. The foundation for the New York investigation was to be an extensive data bank. OCR had identified 2,000 "attributes" -- these were labels for discrete pieces of information that had to be obtained in order to test all of its hypotheses about discrimination. Thousands of pages of

documents containing the necessary information would be transformed into microfiche records (or into entries on computer tapes) and then painstakingly indexed according to relevant attributes. Theoretically, OCR would be able to back up its factual conclusions to the most minute particular by retrieving its data sources virtually at the push of a button.

If the data bank was the heart of the investigation, the "data analysis plan" was its brain. This plan was a complex guide linking the hypothesis set out in the Issues Outline to the attributes cells in the data base. For example, the hypothesis that minority children were given "less expensive human resources" would first be broken down into subquestions and then cross-referenced against the client groups involved, types of resources, information needed, etc. The plan was like a cookbook -- it told one what ingredients were needed to establish a particular finding, where to get them, and to to combine them.

In the midst of all this complexity, there was one important respect of which the data operation was comparatively simple. Because of OCR's legal and administrative ability to obtain complete information regarding most attributes--*e.g.*, the race of every principal in the entire school system--the statistical analyses could be based on relatively simple correlations. In other words, OCR had the full "universe" of data and did not need to engage in complex, abstract mathematical formulas to establish the validity of a sample and the statistical significance of correlations within the sample.

30 A valid question may be raised, however, as to whether such extensive data gathering can reach a saturation point beyond which principals and teachers who feel overburdened with data requests will not make the effort to provide accurate or complete information. Henry Boas indicated that this point may have been reached in Los Angeles, even though that city did not experience a full scale investigation like New York's.

A major question must also be raised as to how representative the New York investigation was of administrative factfinding in general or even of typical OCR investigations. The extent of the resource commitment here was enormous and it is not clear that OCR is in a position to undertake such complete factfinding in "normal investigations". Its Los Angeles Big City Review for example, did not even purport to undertake the extensive data processing functions of the New York review.

Moreoever, in addition to questions of resource availability and commitment, there may be political and legal limitations on OCR's ability to replicate massive investigations of this type. The Philadelphia Big City Review illustrates the problems involved. There, although the school district in all other ways was probably more cooperative with OCR officials than were New York's school representatives, from the beginning they took a strong line on limiting OCR's "burdensome" data gathering requests. Superintendent Marcase sent detailed letters to Secretary Califano and Philadelphia Congressmen and Pennsylvania Senators complaining that OCR's data request would cost the district up to two million dollars. See e.g., letter from Dr. Michael P. Marcase to Joseph Califano, Jr. dated February 7, 1977 and letter from Dr. Michael P. Marcase to Hon. Joshua Eilberg dated February 7, 1977. Shortly thereafter, many of the data requests were withdrawn (See letter from Albert T. Hamlin to Dr. Michael P. Marcase dated February 17, 1977.)

Philadelphia also attacked OCR's data gathering on legal grounds. It claimed that OCR was not a regulatory agency and, therefore, in the absence of specific complaints, it did not have authority to seek wide-ranging information from the school district. In addition, Philadelphia officials alleged that OCR violated the Federal Reports Act because it had not obtained clearance from the Office of Management and Budget before using survey protocols. Philadelphia's complaints in this regard resulted in OMB officials writing to Gerry and HEW officials and stating that there had indeed been a violation of the Act and asking OCR to submit its forms for clearance. (See e.g., letter from Joseph W. Duncan to Martin M. Gerry dated February 13, 1976). The delay attendant upon this clearance process in the end resulted in a decision by OCR to withdraw its data gathering attempts in certain areas, especially discipline. (Penry, Wilson Interviews).

There were also indications that at one point Gerry agreed to pay Philadelphia for the extra administrative costs involved in meeting the data requests, but this apparantly never materialized. (Wilson Interview).

31 Boas interview. (Boas, besides being Program Planning Coordinator for the Los Angeles Unified School District, also served as Chairman of the Committee on Evaluation and Information Systems for the Council of Chief State School Officers.)

When asked to respond to these charges, John Palomino, Chief, Education Branch, OCR, Region IX, agreed that OCR personnel are basically attorneys and statisticians. "If we had mainly educators, we would never have desegregation. Hard statistics are necessary to put educational rationales in perspective."

32 Of course, Judge Weinstein did not define his task as determining whether OCR had actually proven that the Board had violated Title VI or the Constitution. Rather, because the case arose as a claim that the Board and OCR had violated the law by entering into a settlement agreement providing for racially defined remedies, the standard he applied was whether the parties "could have reasonably believed a violation of the Constitution on the statutes could be shown " 486 F. Supp. 862, 885. He found that OCR's legal arguments and factual proofs passed this test.

33 Gerry was surprised by the absence of strong patterns of non-comparability. (Note that in Chicago after an administrative enforcement hearing in which the school district chose not to participate, the law judge concluded that OCR had not proven its case on comparability. OCR prevailed on its other allegations. In the Matter of Chicago Public School District No. 299, et al., Docket No. S-120 (February 15, 1977).

34 See EPAC, supra n. 1, chs. 5 and 10. In 41 cases in which remedial orders were issued, only 15 involved extensive reform decrees requiring ongoing judicial involvement in school district affairs.

35 Attorneys interviewed in these 41 cases indicated there was "full compliance" with court orders in 32, partial compliance in 9 and in no instance was token or "no" compliance indicated.

36 OCR does have the option of asking the Justice Department to bring an injunctive suit against a fund recipient to perform its obligations under the assurances it executed as part of its funding contract. Of course, this option makes OCR dependent upon decisions by the Justice Department and the courts. OCR has tended not to use this route.

Additionally, in desegregation cases, OCR can refer a case to the Justice Department for prosecution of constitutional violations under Title IV of the 1964 Civil Rights Act. This procedure has been used. See p. 103 supra; see also Brown v. Weinberger, 417 F. Supp. 1215, _____ (D.D.C. 1976); U.S. v. Chicago, ____C______(E.D. Ill.).

37 See pp. 140-141, supra See H.R. Rodgers and C. Bullock, Coercion to Compliance (1976), G. Orfield, Reconstruction of Southern Education (1969).

38 J. Califano, Governing America: An Insider's Report from the White House and the Cabinet 253 (1981). For example, John Palomiño, Chief of OCR's educational branch in Region IX, noted in the course of his interview that he was sure the Los Angeles School District attorneys would have advised the Board that in the last ten years, funds had actually been cut off in only one district and that consequently there was little real likelihood of a Title VI funding cutoff in Los Angeles.

39 The deferral approach permitted graduated pressure in more modest and therefore politically viable degrees, but by the late 1970's there were too few new federal programs to make deferral regularly available.

40 In some situations, the relatively small ESAA grant amount could indirectly be given added force by outside pressures. For example, in Los Angeles and Philadelphia, ESAA monies were counted upon to fund desegregation activities otherwise required by civil rights orders of state courts so that the loss of the federal grant could set off a chain reaction of sanctions through other agencies.

41 The final faculty assignment provisions were negotiated prior to the emergence of the CETA deferral

threat in August. However, the complete agreement may never have been accepted by the Board in September were it not for the CETA pressure on both the union and the Board.

42 In our survey, 14 of the 15 responses received from federal and Board of Education officials said that the CETA deferral sanction "gave OCR significant leverage to obtain concessions from the Board of Education during the negotiations of the first agreement." Fifteen respondents also gave this answer regarding ESAA and 11 respondents gave this response regarding Title VI cutoff. Our respondents were also asked to name the single most important sanction. Out of the 15 OCR and Board of Education respondents, 9 singled out CETA deferral; 2 stressed ESAA; and 2 named Title VI termination. (An additional respondent listed both ESAA and CETA.) Similarly, key negotiators Tatel, Flannery and Schonhaut put great emphasis on CETA as a key factor -- perhaps a necessary one -- for concluding an agreement.

Although the Title VI funding termination sanction had little real credibility among school district officials, it did continue to effect the overall process in an unforseen and fascinating way. Although the OCR and Board of Education respondents in our survey (those "in the know") overwhelmingly listed the CETA and ESAA threats as OCR's most effective sanctions, all four of the interest group respondents who answered this question thought that the Title VI termination threat was the most formidable. This was consistent with statements made to us by union officials in Los Angeles, that although they realized Title VI funding cut-offs were not likely, the population at large tended to believe that all federal funding might really be terminated. This general perception facilitated their public relations efforts; it allowed them to justify acceptance of mandatory transfers to the membership by indicating that if it fought the agreement, the district might potentially lose millions of dollars in total federal fundings.

In New York similar general perceptions also had some significance. The OCR Agreement was reached at a time of great uncertainty about the City's creditworthiness, heightened by SEC allegations that the city may have misrepresented its financial condition on its bond prospectus. Hence, even if the Title VI fund termination threat was not credible to knowledgeable City officials, it might deter wary investors in city bonds. Schonhaut Interview.

43 *See* questionnaire responses discussed at n. 2 *supra*. Because full case study reviews were not conducted in the other cities, we did not undertake comparable questionnaire surveys in Chicago, Los Angeles, and Philadelphia. It would, of course, have been interesting to obtain the opinions of the school officials in those cities where OCR achieved immediate implementation of controversial large-scale teacher transfer plans, as to comparable court/OCR "intrusiveness."

44 And, of course, as we noted in Ch. 9, the longer it takes an implementation process to unfold, the greater the number of complicating variables that will intercede.

45 If OCR had included local constituency groups as partners in the process, it is possible that a mechanism might have been included in the agreement that would have given these groups some monitoring role in the implementation process. Any such role, however, was not likely to have been as extensive as that of a party in the court case.

46 Interestingly, although OCR had not pursued this option in New York, some blacks and Puerto Ricans, have commenced an enforcement suit claiming, *inter alia*, that they are third party beneficiaries of the agreement between OCR and the Board of Education. *New York Association of Black Educators II* v. *United States Department of Education*, No. 77 C. 2531 (E.D. N.Y.). *See also* Block, "Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries," Harv. C.R.-C.L. L. Rev. (forthcoming 1983).

47 Note that in Los Angeles and Philadelphia, where the basic agreements could be said to have been "ESAA-driven", the yearly ESAA funding cycle provided an automatic reopening of the case, somewhat comparable to ongoing judicial proceedings, and compliance in those cities has been more substantial than in either New York or Chicago.

CHAPTER ELEVEN

CONCLUSIONS

OCR's massive New York City Review has been dismissed by some critics for attempting to do too little, and by others for attempting to do too much. Staunch civil rights advocates tend to be in the first camp, and students of administrative process in the second.

Civil rights advocates were highly critical of the Big City Review approach because they viewed it as merely a tactic in the Nixon administration's anti-busing campaign, which represented a further retreat from classical student desegregation initiatives.[1] Our analysis of the New York Review suggests, however, that even in its own terms this line of criticism is too narrow. Given the political strictures within which OCR had to operate (i.e., no busing and no metropolitan area desegregation), Martin Gerry devised a highly innovative approach to the broadest array of discrimination issues that had ever been tackled in a school system investigation. Although many of these issues got dropped along the way, the 1977 and 1978 compliance agreements contained significant commitments to anti-discrimination standards which led to positive changes in teacher assignment and student tracking practices.

The academic critics take a different tack. They reject the assumption that OCR should have a strong ideological orientation. For example, Jeremy Rabkin cites the New York Review as an example of what he sees as a consistent OCR history of attempting (unsuccessfully) to impose broad, moralistic civil rights standards, without paying sufficient heed to local administrative and political realities. To escape this cycle of failed policy goals,[2] Rabkin argues, OCR should make a political accomodation with its environment, and attempt to pursue modest goals with minimum controversy.[3]

Our findings contradict Rabkin's thesis. National and local political factors did, in fact, strongly influence the entire process. Gerry tried to avoid a confrontation with the White House over busing or with the teachers' union over employment issues; Tatel tried to reach a moderate agreement that the Board could realistically be expected to implement. Thus, it was not administrative fiat but a process of persuasion and bargaining that produced two balanced agreements which reflected local program and political realities.

The strikingly disparate conclusions of the critics, and the inconsistency between our empirical findings and both lines of criticism can largely be explained, we believe, by their use of only a single analytical perspective. Our multi-faceted methodology, by contrast, led to a more accurate over-all assessment, taking account of ideological tensions, implementation dynamics, and the institutional differences among administrative agencies, courts, and legislatures.

The ideological analysis revealed a unique reconciliation of the equality of opportunity and equality of result strands of American egalitarian ideology. Strict quantitative performance goals were imposed, but in a manner that was sensitive to local programmatic needs and permitted the flexible use of a variety of options to accomplish the agreed goals. In the working out of compromise agreements, the administrative process balanced the tension between the opportunity and result poles of the American egalitarian ideology and brought forth their complementary potential.

The implementation analysis, however, cautioned us against exaggerating the practical consequences of this ideological reconciliation. OCR was able to obtain remedies for only a handful of the problems it had originally identified. Moreover, even where agreement was reached, compliance lagged far behind the agreed standards, and in the employment area, delays and political intervention led to the negotiation of a new agreement. Serious questions must be raised, therefore, as to whether the millions of dollars and thousands of hours devoted to this effort were justified.

One way to attempt to answer these questions is through a comparative institutional analysis. We contrasted OCR's enforcement capabilities with the courts' performance in institutional reform litigation. Comparatively speaking, we found that OCR exhibited an impressive investigative and fact-finding capacity. On the other hand, OCR afforded less opportunity for participation by affected interest groups. We also concluded that OCR was in a better position to achieve substantial compliance with precisely stated remedial orders having immediate deadlines, but that the courts seemed better able to monitor compliance on a long-term basis and to respond to unforeseen developments that inevitably arise during the implementation process. (We would also note that although a court taking jurisdiction of similar issues may not have been readily able to reconcile the competing ideological strands, it probably would have maintained a more comprehensive perspective on the full range of issues initially presented).

A major theme that reappeared within each of the analytic perspectives was OCR's role as a policy-maker. Congress' failure to define the key egalitarian concepts in the Title VI statute conveyed substantial policy making authority to OCR. The egalitarian policies which emerged from the give and take of the enforcement process were undoubtably more "result oriented" than those which the drafters of the bill would themselves have articulated.

But OCR's policy formulation was responsive both to many of the political factors that would influce a legislature, and to many of the legal principles that would influence a court. The important difference, we noted, is that policy making when delegated to an administrative enforcement agency will respond to these considerations through a "pragmatic analytic" decision making mode, rather than through the mutual adjustment of the legislative process or the rational-analytic approach of the judicial process. For some purposes this may be a "better" policy making approach. For other purposes, it may not.

Although OCR's civil rights enforcement mandate and its mode of operation differ from traditional regulatory agencies, our findings and conclusions concerning OCR's policy-making activities are highly relevant to the general problems of delegation of policy-making authority which critically affect all administrative agencies.[4] We believe, therefore, that the advantages and disadvantages of the "pragmatic analytic" policy making mode and of the administrative process inherent result orientation should be considered by Congress and state legislatation before they delegate authority to administrative agencies.[5]

Traditional separation of powers theory has not adequately defined the appropriate roles of the legislative, executive, and judicial branches, given the dramatic expansion of governmental functions in our quasi-welfare state society. All three branches have assumed unprecedented responsibilities for regulating the private sector --- and for regulating each other's activities. Clearly there is a need for greater understanding and clarification of the respective powers and responsibilities of the three branches, under these circumstances. We believe, therefore, that further empirical analysis of how the differing government institutions are actually relating to these problems-- and to each other -- is necessary both to obtain a practical understanding of the evolution of new institutional roles and a theoretical reconciliation of these changes with the principles of democratic accountability that underlie the separation of powers doctrine.

[1] *See* *e.g.*, G. Orfield, *Must We Bus?* 300-301 (1978); and letter of 57 civil rights and civic organizations (the Leadership Conference on Civil Rights) to Secretary Matthews, dated December 10, 1975, discussed in Ch. 5, n. 58, *supra*.

[2] Rabkin summarized his negative assessment of OCR's involvement in New York as follows:

> "OCR's study of expenditure pattern, in-school tracking systems, and many other school operations in New York consumed more than three years of effort on the part of its New York regional office -- during which time it devoted only peripheral attention to possible civil rights violations in all other school districts of New York and New Jersey. And after all of this effort, OCR in the end backed away from its threat to cut off funds to financially stricken New York, settling for only minor changes in the city's pattern of student services," Rabkin, "Office for Civil Rights," in *The Politics of Regulation* 304-353, at 346 (J. Wilson, ed. 1980).

[3] In a similar vein, Beryl Radin has called for OCR to shift its emphasis more toward grassroots bargaining. B. Radin, *Implementation Change and the Federal Bureaucracy: School Desegregation Policy in HEW, 1964-68*, 209 (1971).

[4] See pp. 13-14, *supra*.

[5] The New York Review also provides specific insights for civil rights enforcement agencies, especially in regard to the potential significance of comprehensive compliance reviews in large urban settings. Civil rights advocates have tended to take a skeptical view of such undertakings, and, indeed, for most of the past decade, the civil rights organizations have fought to improve the individual complaint and investigation process using the legal leverage gained in the *Adams* and *Brown* cases. This strategy may, however, have created an overemphasis on individualized complaints as compared to systemwide issues.

We note in this regard that statistics on OCR's complaint load indicate a bias toward "middle class" issues (such as special education and sex discrimination) at the expense of traditional racial discrimination concerns. In a current 2-1/3 year period, 63% of the complaints that were resolved with corrective action dealt with issues of handicapped children. The second largest category was sex discrimination at 21%. Only 15% of the corrective actions responded to complaints of racial and language minorities. Source: OCR computer printout of complaints closed FY 1980-82 (through April 30, 1982), supplied to the authors pursuant to a Freedom of Information Act request.

APPENDIX A

Major Interviews

(New York, Los Angeles, Chicago and Philadelphia case studies)

NEW YORK

NAME	DATE	IDENTIFYING INFORMATION*
Hon. Irving Anker	6/22/81	Chancellor, City School District of New York, 1973-1978
Frank C. Arricale, II	10/2/81	Executive Director, Office of Personnel, City School District of New York, 1974-1978
Felix Baxter, Esq.	4/24/81	Policy analyst and staff attorney, City School District of New York, 1976-1978
Cynthia Brown	9/28/81	Children's Defense Fund of the Washington Research Project, 1970-1975; Lawyers' Committee for Civil Rights under Law, 1975-1977; Deputy Director, Office for Civil Rights, 1977-1979; Director, Civil Rights Transition Team of the Department of Education, 1979-1980; Assistant Secretary for Civil Rights, 1980-1981.
Carol Campbell	4/23/81	Equal Educational Opportunity Specialist, Office for Civil Rights, 1973-1980.
Richard Caro, Esq.	6/1/81	Assistant United States Attorney, 1975-1981, responsible for Caulfield and related cases and ESAA cases.

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* This column sets forth positions or affiliations that are related to the events being studied.

NAME	DATE	IDENTIFYING INFORMATION*
Frederick Cioffi	4/23/81	Acting Assistant Secretary for Civil Rights, Department of Education, 1981; Director, Elementary and Secondary Education Division, Office for Civil Rights.
Dr. Perry Davis	10/26/81	Assistant to Board of Education Member Steven Aiello, 1974-1978; Director and Acting Director of Office for Funded Programs, City School District of New York, 1978-current.
Susanna Doyle	12/81	Staff, Advocates for Children, 1974-1980.
Arthur Eisenberg, Esq.	6/3/81, 6/4/81	Staff Attorney, New York Civil Liberties Union.
Sandra Feldman	11/12/81	Director, United Federation of Teachers, 1972-current.
David Filvaroff, Esq.	4/2/82	Staff Attorney, United States Justice Department, during deliberations on 1964 Civil Rights Act.
J. Harold Flannery, Esq.	6/23/81, 12/1/81	Consultant to and Chief Negotiator for Office for Civil Rights, 1977-1978 while in private law practice as a member of Foley, Hoag & Elliot, Boston, MA.
Martin H. Gerry, Esq.	9/14/81	Executive Assistant to the OCR Director and OCR investigator, 1969-1974; OCR Deputy Director, 1974-1976; OCR Director, 1976-1977.
Dr. Bernard Gifford	3/19/81	Deputy Chancellor, City School District of New York, 1973-1977.
George Gingerelli	9/28/81	President, Delta Research Corporation, automatic data services contractor for OCR.

NAME	DATE	IDENTIFYING INFORMATION*
Dr. Patricia Alberjerg Graham	11/24/81	Director, National Institute of Education, 1977-1979 and consultant to OCR during 1978 EES negotiations.
Albert Hamlin, Esq.	4/23/81	Various legal positions in the Justice Department and Department of HEW responsible for civil rights enforcement, 1956-1977; Acting Director, OCR, 1977.
Dawn Hyland	11/18/81	Staff, Region II, Office for Civil Rights.
Leroy Jones, Esq.	4/23/81	Civil Rights specialist, investigator and Branch Chief, Office for Civil Rights, national office
James Meyerson, Esq.	2/3/81	Staff Attorney, NAACP [dates].
Michael Rosen	3/19/81, 3/20/81	Counsel to Chancellor, 197?-1978.
Harold Siegel, Esq.	6/10/81	Counsel and Secretary to the Board of Education of the City School District of New York, 19?-197?.
Dr. Charles Schonhaut	10/27/81,11/13/81	Senior Assistant to the Chancellor and Chief Negotiator for Board of Education, 1977-78.
Paul Smith	4/16/82*	Children's Defense of the Washington Research Project
David Tatel, Esq.	4/24/81	Director, Office for Civil Rights, 1977-1979.

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* Telephone interview.

NAME	DATE	IDENTIFYING INFORMATION*
Charles Tejada, Esq.	11/18/81	Director, Region II, Office for Civil Rights, 1979-current.
Helen Whitney	11/18/81, 12/81	Equal Opportunity Specialist, Region II, Office for Civil Rights, 1973-1980; Branch Chief, Region II, Office for Civil Rights, 1980-current.

LOS ANGELES

NAME	DATE	IDENTIFYING INFORMATION*
Henry E. Boas	1/27/82	Program Planning Coordinator, L.A.U.S.D.
George Dalton, Esq.	1/28/82	Attorney for Plaintiffs -- *Zaslowsky, et. al*. v. *Board of Education*.
Sam Kresner	1/28/82	Director of Staff, United Teachers of Los Angeles.
John E. Palomino	1/29/82	Chief, Education Branch, Office for Civil Rights, Region IX.
Dr. Robert Seoule	1/27/82	Administrator, Personnel Division, L.A.U.S.D.
Dr. James B. Taylor	1/27/81	Associate Superintendent, Planning, L.A.U.S.D.

CHICAGO

NAME	DATE	IDENTIFYING INFORMATION*
Mary Jane Cross	12/17/81*	Equal Opportunity Specialist, Office for Civil Rights, Region 5.
Conrad Harper, Esq.	10/22/81	Consultant to and Chief Negotiator for Office of Civil Rights while in private law practice as a member of Simpson, Thatcher & Bartlett, New York, New York
Robert M. Healey	1/7/81*	President, Chicago Teachers Union.
Dr. Joan Raymond	12/17/81	Assistant Superintendent for Administration.

PHILADELPHIA

NAME	DATE	IDENTIFYING INFORMATION*
Michael R. Aaronson	4/14/82	Assistant to the Executive Director, Office of Personnel and Labor Relations, Board of Education.
Murray Bookbinder	4/14/82	Executive Director, Office of Personnel and Labor Relations, Board of Education,
Martin Horowitz, Esq.	4/14/82	Attorney, Office of Legal Counsel, Board of Education.
Barry Keen	4/14/82	ESAA Specialist (1982), OCR, Region III.
Theodore Nixon	4/14/82	Chief, Elementary and Secondary Education Division, OCR, Region III.
Edward B. Penry	4/14/82	Director of Research, Board of Education, School District of Philadelphia.
John Ryan	4/15/82*	President, Philadelphia Federation of Teachers.
Harry O. Wilson	4/14/82	Project Director, Equal Education Services Review, OCR, Region III.

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* Telephone interview.

APPENDIX B

SURVEY

In conducting our case study, we obtained most of our information from documents and from free-flowing, in-depth interviews with key participants in the New York City Review. To supplement these in-depth interviews, we also asked all of our interviewees -- as well as a number of interest group representatives who did not directly participate in the process -- to respond to the standardized questions in our structured opinion survey.

As "opinion survey" implies, our aim was not to obtain hard "objective" facts or statistically significant responses, but rather to add an additional dimension to our research by obtaining in a standardized format the opinions and perceptions of persons who viewed the administrative enforcement process from different perspectives. In addition, by asking our interview subjects, as well as interest group "outsiders", to respond to the survey, we were able to look for indications of any major differences between the perceptions of the persons closely involved with the process and those of more peripheral participants. (Through this comparison, we found, for example, that the "outsiders" generally believed that the Title VI fund termination sanction was a powerful threat, whereas a consensus of the "insiders" was that this sanction simply was not credible.)

The choice of respondents for this survey was not intended to be a scientific sampling process. Rather, a survey was sent to any person or organization who was indicated by our documentary files or interviews to have had some significant interest in the Review. As might be expected, especially many years after the fact, several individuals could not be reached and others said that either they had not been significantly involved or else their recollections were not keen enough to respond confidently. In the end, we received 22 completed surveys.

The survey responses provided valuable background information. In addition, some of the patterns in the responses were sufficiently clear that they could be cited as further support for particular findings in our report. Again, however, the validity of these inferences from the survey data was not based on any technical or scientific presumptions, but rather on a common sense use of the information.

A copy of the survey form is reproduced in the following pages.

Person or Agency

OPINION SURVEY

OCR-NYC SPECIAL COMPLIANCE REVIEW STUDY

1. OCR alleged that 10 educational practices and conditions -- listed below -- occurred in New York City and denied children equal educational opportunity as guaranteed by Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Rehabilitation Act of 1973.

   Please indicate those allegations which you believe were accurate in 1976 by checking the appropriate space under "Accurate in 1976" (column 1). Then, for each allegation checked:

   -- if you think the practice or condition was a major problem in 1976 for which remedial action should have been undertaken, check column 2;

   -- if you think OCR's intervention improved the situation, check column 3;

   -- if you think the practice or condition is a major problem today, check column 4.

Allegation	(1) Accurate 1976	(2) Problem 1976	(3) OCR Improved	(4) Problem Today
a) Board of Examiners licensing procedures disproportionately disqualified prospective minority teachers.				
b) Teacher assignment practices caused minority teachers to be placed disproportionately in schools having predominantly minority student bodies.				
c) Predominantly minority schools received fewer resources per pupil than non-minority schools.				
d) Ability grouping and other practices led to racially identifiable instruction settings within schools.				
e) Minority students were disproportionately represented in the Special Admissions High Schools.				
f) Different discipline standards were applied to minority students.				
g) Proportionately fewer women than men were appointed to supervisory positions.				
h) Fewer resources per pupil were allocated to girls' athletic programs.				
i) Vocational programs were largely sex-segregated, and girls' programs received fewer resources per capita.				
j) Handicapped students were kept waiting for evaluation services and appropriate placements for excessively long time periods.				

2. How would you characterize OCR's overall performance in gathering and analyzing factual data during the compliance review process? Do you feel that OCR's performance was ... (Check below)

	Yes	No	Mixed
Complete?	___	___	___
Objective?	___	___	___
Methodologically sound?	___	___	___

3. Which organization(s) do you feel were significantly involved in the compliance review and/or negotiations?

____

____

4. Do you think that any organization(s) should have been more involved in the review and/or negotiations? (Please check) Yes ______ No _______. (If yes) which one(s)? (Please explain)

____

____

5. To the best of your knowledge, did any organization(s) attempt to become more involved in the review and/or negotiations, but fail to do so? (Please check) Yes ____ No ____ (If yes) which one(s)? (Please explain)

____

____

6. Do you think that the OCR compliance review process significantly increased the influence or power of any local organizations or agencies in educational affairs? (Please check) Yes_____ No_____ (If yes) which organizations or agencies?

____

____

7. Do you think that OCR's compliance review process caused either an increase or decrease in confrontation among local groups (e.g. advocacy groups, public agencies, unions)? (Please check) Increase____ Decrease_____ No Change _____

8. Do you think that OCR exceeded its proper role or legal authority in the course of the compliance review process? (Please check) Yes ____ No ____. (If yes) please explain how.

____

____

b. Do you feel that the Board of Education's positions or actions in the compliance review process consistently reflected one of these philosophies? (Please check the appropriate item below)

Yes, Equality of Opportunity ________

Yes, Equality of Result ________

Yes, but different philosophies at different times ________

No, the Board of Education's actions did not consistently reflect either philosophy ________

12. In recent years, federal court involvement in cases against the New York City Board of Education, e.g. ASPIRA, Chance, Lora and Jose P., have had substantial impact on the school system. We are interested in how you feel about OCR's compliance review process as compared to that of the federal courts. Please read the statements below and indicate for each how much you agree or disagree with that statement.

	Strongly agree	Moderately agree	Moderately disagree	Strongly disagree
1. In general, the courts seemed to interfere with day to day school operations more than did OCR.				
2. In general, the judges seemed to understand NYC educational policy better than did OCR officials.				
3. In general, the court decrees seemed to be implemented more effectively than the OCR agreements.				

13. Is there anything else you would like to tell us concerning the OCR compliance review process?

14. And now just a few last questions about you and your role in the OCR-NYC compliance review.

a. What is your name? ______________________________

b. What is your profession or occupation? ________________

c. What positions and/or organizational affiliations did you hold from 1972 to 1981 which are relevant to OCR's New York City Review?

d. How would you describe the nature of your personal involvement or sources of information regarding the Review?

Would you like a copy of our survey results? Yes ___ No ___

Thank you very much.